The Supreme Court confronted this problem in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982). There, a group of white-owned businesses sued the NAACP and others who organized a civil rights boycott against the stores. To give the boycott teeth, activists wearing black hats stood outside the stores and wrote down the names of black patrons. After these names were read aloud at meetings and published in a newspaper, sporadic acts of violence were committed against the persons and property of those on the list. At one public rally, Charles Evers, a boycott organizer, threatened that boycott breakers would be "disciplined" and warned that the sheriff could not protect them at night. *See id.* at 902, 102 S.Ct. 3409. At another rally, Evers stated, "If we catch any of you going in any of them racist stores, we're gonna break your damn neck." *See id.* The Mississippi courts held the boycott organizers liable based on Evers's statements and the activities of the black-hatted activists.

The Supreme Court acknowledged that Evers's statements could be interpreted as inviting violent retaliation, "or at least as *intending to create a fear of violence* whether or not improper discipline was specifically intended." *Id.* at 927, 102 S.Ct. 3409 (emphasis added). Nevertheless, it held that the statements were protected because there was insufficient evidence that Evers had "authorized, ratified, or directly threatened acts of violence." *Id.* at 929, 102 S.Ct. 3409. Nor was publication of the boycott violators' names a sufficient basis for liability, even though collecting and publishing the names contributed to the atmosphere of intimidation that had harmed plaintiffs. *See id.* at 925-26, 102 S.Ct. 3409. While Charles Evers and the defendants in our case pursued very different political

goals, the two cases have one key thing in common: Political activists used words in an effort to bend opponents to their will.

The First Amendment protects ACLA's statements no less than the statements of the NAACP. Defendants can only be held liable if they "authorized, ratified, or directly threatened" violence. If defendants threatened to commit violent acts, by working alone or with others, then their statements could properly support the verdict. But if their statements merely encouraged unrelated terrorists, then their words are protected by the First Amendment.

Political speech may not be punished just because it makes it more likely that someone will be harmed at some unknown time in the future by an unrelated third party. In *Brandenburg v. Ohio,* 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (per curiam), the Supreme Court held that the First Amendment protects speech that encourages others to commit violence, unless the speech is capable of "producing imminent lawless action." *Id.* at 447, 89 S.Ct. 1827. It doesn't matter if the speech makes future violence more likely; advocating "illegal action at some indefinite future time" is protected. *Hess v. Indiana,* 414 U.S. 105, 108, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) (per curiam). If the First Amendment protects speech advocating violence, then it must also protect speech that does not advocate violence but still makes it more likely. Unless ACLA threatened that its members would themselves assault the doctors, the First Amendment protects its speech.[7]

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[7] If such statements were unprotected threats, newspapers might face liability for publishing stories that increased the likelihood that readers would harm particular persons, for example by disclosing the

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B. ACLA's speech no doubt frightened the doctors, but the constitutional question turns on the source of their fear.[8] The doctors might have understood the statements as veiled threats that ACLA's members (or others working with ACLA) would inflict bodily harm on the doctors unless they stopped performing abortions. So interpreted,

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identity of mobsters in hiding or convicted child molesters. This would permit the imposition of liability for the mere publication of news, dramatically undercutting the freedom constitutionally accorded to the press. *Cf. New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (recognizing the need to protect our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

[8] It is not unlawful to say things that frighten other people. A doctor who discloses an adverse prognosis often instills fear in the patient and his family; predicting a future event – "That bus is about to hit your child!" – can cause the listener intense apprehension. Yet such statements are not (and cannot be made) unlawful. Nor does it matter that the speaker makes the statement for the very purpose of causing fear. Let's say your malicious neighbor sees your house is burning. He calls you at work and announces: "Your house is on fire!" This may scare you – it may have no other purpose – yet it is lawful because it is speech and does not fall within one of the narrow categories the Supreme Court has held is unprotected under the First Amendment.

The matter is more complicated where the speech is intended to intimidate the listener into changing his conduct. Blackmail and extortion – the threat that the speaker will say or do something unpleasant unless you take, or refrain from taking, certain actions – are not constitutionally protected. *See, e.g., Watts*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664. On the other hand, the statement, "If you smoke cigarettes you will die of lung cancer," is protected, even though its purpose is to scare you into quitting smoking. So is, "If you mess around with Tom's girlfriend, he'll break your legs," unless the speaker is sent by Tom. The difference is this: In the case of blackmail and extortion, you are given to understand that, unless you do what's asked of you, the speaker himself (or someone acting on his behalf) will bring about that which you abhor; in the other examples, the speaker has no control over the adverse consequences and merely predicts what is likely to happen if you act (or refrain from acting) in a particular way.

the statements are unprotected by the First Amendment, regardless of whether the activists had the means or intent to carry out the threats. *See United States v. Orozco-Santillan,* 903 F.2d 1262, 1265 n. 3 (9th Cir.1990). So long as they should have foreseen that the doctors would take the threats seriously, the speech is unlawful. *See id.* at 1265.[9]

But the statements might also have scared the doctors in another way. By singling out the plaintiffs from among the thousands across the country who are involved in delivering abortion services, ACLA called them to the unfriendly attention of violent anti-abortion activists. And by publishing the doctors' addresses, ACLA made it easier for any would-be terrorists to carry out their gruesome mission.[10] From the doctors' point of view, such speech may

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[9] Our case law has not been entirely consistent as to whether a speaker may be penalized for negligently uttering a threat or whether he must have specifically intended to threaten. *Compare Orozco-Santillan,* 903 F.2d at 1265 ("Whether a particular statement may properly be considered to be a threat is governed by an objective standard – whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault."), *with United States v. Gilbert* (*Gilbert I*), 813 F.2d 1523, 1529 (9th Cir.1987) ("[Gilbert] correctly identifies the element of intent specified in section 3631 as the determinative factor separating protected expression from unprotected criminal behavior. . . . [T]he statute's requirement of intent to intimidate serves to insulate the statute from unconstitutional application to protected speech." (citation omitted)). While we believe that *Gilbert I* states the correct rule, the result here is the same under either standard. We therefore presume that the less speech-protective standard of *Orozco-Santillan* applies.

[10] We need not decide here whether the First Amendment would protect defendants from a suit for invasion of privacy, because plaintiffs do not claim damages based solely on the publication of private facts, namely their addresses and telephone numbers. *Cf. Anderson v. Fisher Broadcasting Cos.,* 300 Or. 452, 712 P.2d 803, 807 (1986) (recognizing a

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be just as frightening as a direct threat, but it remains protected under *Claiborne Hardware*.

The jury would be entitled to hold defendants liable if it understood the statements as expressing their intention to assault the doctors but not if it understood the statements as merely encouraging or making it more likely that others would do so. But the jury instruction was ambiguous on this critical point. The instruction provided that "[a] statement is a 'true threat' when a reasonable person making the statement would foresee that the statement would be interpreted by those to whom it is communicated as a serious expression of an intent to bodily harm or assault." Jury Instruction No. 10, at 14. This instruction was consistent with our previous threat cases. *See Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 372 (9th Cir.1996). But in those previous cases, there was no need to emphasize that threats must be direct because the speakers themselves made it perfectly clear that they would be the ones to carry out the threats.[11] Under the instruction in

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tort for invasion of privacy when the tortfeasor has the specific intent to cause plaintiff severe mental or emotional distress and such conduct exceeds "the farthest reach of socially tolerable behavior").

[11] *See, e.g., Lovell*, 90 F.3d at 369 (student told administrator, "I'm going to shoot you"); *Melugin v. Hames*, 38 F.3d 1478, 1481 (9th Cir.1994) (civil defendant sent letter to judge threatening to kill him); *Orozco-Santillan*, 903 F.2d at 1264 (arrestee threatened INS agent at his arrest and during subsequent phone calls); *United States v. Gilbert (Gilbert II)*, 884 F.2d 454, 455-56 (9th Cir.1989) (white supremacist mailed a letter to the head of an inter-racial adoption agency, condemning her occupation and enclosing posters suggesting he would commit violence against inter-racial couples and ethnic minorities); *United States v. Mitchell*, 812 F.2d 1250, 1252 (9th Cir.1987) (defendant told Secret Service agents he was going to kill them and the President); *Roy v. United States*, 416 F.2d 874, 875 (9th Cir.1969) (marine called the White House and said he was going to kill the President). The instruc-

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this case, the jury could have found the anti-abortion activists liable based on the fact that, by publishing the doctors' names, the activists made it more likely that the doctors would be harmed by third parties.

This is not a fanciful possibility. The record contains much evidence that the doctors were frightened, at least in part, because they anticipated that their unwelcome notoriety could expose them to physical attacks from third parties unrelated to defendants. For example, plaintiff Dr. Elizabeth Newhall testified, "I feel like my risk comes from being identified as a target. And . . . all the John Salvis in the world know who I am, and that's my concern."[12] Testimony of Elizabeth Newhall, *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, No. CV 95-01671-JO, at 302 (D.Or. Jan. 8, 1999); *see also id.* at 290 ("[U]p until January of '95, I felt relatively diluted by the – you know, in the pool of providers of abortion services. I didn't feel particularly visible to the people who were – you know, to the John Salvis of the world, you know. I sort of felt one of a big, big group."). Likewise, Dr. Warren Martin Hern, another plaintiff, testified that when he heard he was on the list, "I was terrified. . . . [I]t's hard to describe the feeling that – that you are on a list of people to – who have been brought to public attention in this way. I felt that this was a – a list of doctors to be killed." Testimony of Warren Martin Hern,

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tion continues to be good law in cases where the source of the threatened violence is not an issue.

[12] In December 1994, John Salvi killed two clinic workers and wounded five others in attacks on two clinics in Brookline, Massachusetts; Salvi later fired shots at a clinic in Norfolk, Virginia before he was apprehended. Salvi is not a defendant in this case.

Planned Parenthood, No. CV 95-01671-JO, at 625 (Jan. 11, 1999).

Were the instruction taken literally, the jury could have concluded that ACLA's statements contained "a serious expression of intent to harm," not because they authorized or directly threatened violence, but because they put the doctors in harm's way. However, the First Amendment does not permit the imposition of liability on that basis.

C. Although the jury instruction was ambiguous, we need not decide whether the ambiguity was so great as to require us to set aside the verdict. Even if the jury drew only the permissible inference, we must evaluate the record for ourselves to ensure that the judgment did not trespass on the defendants' First Amendment rights. Specifically, we must determine whether ACLA's statements could reasonably be construed as saying that ACLA (or its agents) would physically harm doctors who did not stop performing abortions. Because the district court rejected the First Amendment claim, we conduct a *de novo* review of both the law and the relevant facts. *See Lovell,* 90 F.3d at 370. The question therefore is not whether the facts found below are supported by the record but whether we, looking at the record with fresh eyes, make the same findings. If we disagree with the district court, our findings prevail. *See Eastwood v. National Enquirer, Inc.,* 123 F.3d 1249, 1252 (9th Cir.1997).

We start by noting that none of the statements ACLA is accused of making mention violence at all. While pungent, even highly offensive, ACLA's statements carefully avoid threatening the doctors with harm "in the sense that there are no 'quotable quotes' calling for violence against

the targeted providers." *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 23 F.Supp.2d 1182, 1186 (D.Or.1998). Instead, ACLA offers rewards to those who take nonviolent measures against the doctors, such as seeking the revocation of their medical licenses and protesting their activities. One poster talks about persuading Crist to "turn from his child killing," but stops short of suggesting any violence or other criminal conduct against him. The website seeks to gather information about abortion supporters and encourages others to do the same. ACLA also speaks of future "perfectly legal" Nuremberg-like trials, to be held at a time when public opinion has turned in its favor.

We recognize that the words actually used are not dispositive, because a threat may be inferred from the context in which the statements are made.[13] However, there are at least two kinds of ambiguity that context can resolve. The first deals with statements that call for violence on their face, but are unclear as to *who* is to

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[13] *See, e.g., Orozco-Santillan*, 903 F.2d at 1265 ("Alleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners."); *Gilbert II*, 884 F.2d at 457 ("The fact that a threat is subtle does not make it less of a threat."). Other courts have also recognized that ambiguous language may still constitute a threat. *See United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir.1996) (holding that an anti-abortion activist, who had previously used force against clinic personnel, threatened Dr. Crist when she screamed at him on numerous occasions that he could be killed if he kept on committing abortions); *United States v. Malik*, 16 F.3d 45, 49 (2d Cir.1994) (finding a threat where defendant sent letters to a federal appellate judge suggesting he would use force against the panel unless it reversed its decision); *United States v. Khorrami*, 895 F.2d 1186, 1193 (7th Cir.1990) (holding that defendant made a threat by repeatedly making anti-Semitic phone calls to a Jewish organization and sending it letters calling for the deaths of Israeli leaders).

commit the violent acts – the speaker or a third party. All cases of which we are aware fall into this category: They hold that, where the speaker expressly mentions future violence, context can make it clear that it is the speaker himself who means to carry out the threat. *See* note 13 *supra*.

A more difficult problem arises when the statements, like the ones here, not only fail to threaten violence by the defendants, but fail to mention future violence at all.[14] Can context supply the violent message that language alone leaves out? While no case answers this question, we note important theoretical objections to stretching context so far. Context, after all, is often not of the speaker's making. For example, the district court in this case admitted evidence of numerous acts of violence surrounding the abortion controversy, almost none of them committed by the defendants or anyone connected with them.[15] In the jury's eyes, then, defendants' statements were infused with a violent meaning, at least in part, because of the actions of others. If this were a permissible inference, it could have a highly chilling effect on public debate on any cause

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[14] The defendants come closest to suggesting violence on the webpage, where the names of the murdered doctors are stricken and the wounded ones are grayed. We read the striketype and graying as the equivalent of marking "killed" or "wounded" next to the names. This clearly reports past violent acts and may connote approval. But it cannot fairly be read as calling for future violence against the several hundred other doctors, politicians, judges and celebrities on the list; otherwise any statement approving past violence could automatically be construed as calling for future violence.

[15] Defendants objected to admission of much of this evidence and press their objections on appeal. Given our ruling on the merits, we need not pass on this issue. Nothing we say, therefore, should be construed as approving the district court's evidentiary rulings.

where somebody, somewhere has committed a violent act in connection with that cause. A party who does not intend to threaten harm, nor say anything at all suggesting violence, would risk liability by speaking out in the midst of a highly charged environment.

In considering whether context could import a violent meaning to ACLA's non-violent statements, we deem it highly significant that all the statements were made in the context of public discourse, not in direct personal communications. Although the First Amendment does not protect all forms of public speech, such as statements inciting violence or an imminent panic, the public nature of the speech bears heavily upon whether it could be interpreted as a threat.[16] As we held in *McCalden v. California Library Ass'n*, 955 F.2d 1214 (9th Cir.1990), "public speeches advocating violence" are given substantially more leeway under the First Amendment than "privately communicated threats." *Id.* at 1222; *see also Orozco-Santillan*, 903 F.2d at 1265 ("Although a threat must be 'distinguished from what is constitutionally protected speech,' this is not a case involving statements with a political message.")

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[16] The doctors do not claim that ACLA's speech amounted to incitement. To rise to incitement, the speech must be capable of "producing imminent lawless action." *Brandenburg*, 395 U.S. at 447, 89 S.Ct. 1827. Here, the statements were made at public rallies, far away from the doctors, and before an audience that included members of the press. ACLA offered rewards to those who stopped the doctors at "some indefinite future time," *Hess*, 414 U.S. at 108, 94 S.Ct. 326, and the ambiguous message was hardly what one would say to incite others to immediately break the law. Finally, the statements were not in fact followed by acts of violence. *See Claiborne Hardware*, 458 U.S. at 928, 102 S.Ct. 3409 ("[H]ad [the speech] been followed by acts of violence, a substantial question would be presented" as to incitement, but "[w]hen such appeals do not incite lawless action, they must be regarded as protected speech.").

(quoting *Watts v. United States,* 394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) (per curiam)).

There are two reasons for this distinction: First, what may be hyperbole in a public speech may be understood (and intended) as a threat if communicated directly to the person threatened, whether face-to-face, by telephone or by letter. In targeting the recipient personally, the speaker leaves no doubt that he is sending the recipient a message of some sort. In contrast, typical political statements at rallies or through the media are far more diffuse in their focus because they are generally intended, at least in part, to shore up political support for the speaker's position.

Second, and more importantly, speech made through the normal channels of group communication, and concerning matters of public policy, is given the maximum level of protection by the Free Speech Clause because it lies at the core of the First Amendment. *See Claiborne Hardware,* 458 U.S. at 926-27, 102 S.Ct. 3409 ("Since respondents would impose liability on the basis of a public address – which predominantly contained highly charged political rhetoric lying at the core of the First Amendment-we approach this suggested basis of liability with extreme care."). With respect to such speech, we must defer to the well-recognized principle that political statements are inherently prone to exaggeration and hyperbole. *See Watts,* 394 U.S. at 708, 89 S.Ct. 1399 ("The language of the political arena . . . is often vituperative, abusive, and inexact." (citation omitted)). If political discourse is to rally public opinion and challenge conventional thinking, it cannot be subdued. Nor may we saddle political speakers with implications their words do not literally convey but are later "discovered" by judges and juries with the benefit

of hindsight and by reference to facts over which the speaker has no control.

Our guiding light, once again, is *Claiborne Hardware*. There, Charles Evers expressly threatened violence when he warned the boycott violators that "we're gonna break your damn neck[s]," and that the sheriff could not protect them from retribution. *See* 458 U.S. at 902, 102 S.Ct. 3409. Evers made these statements at a time when there had already been violence against the boycott breakers. Evers did not himself identify specific individuals to be disciplined, but his associates had gathered and published the names, and there's no doubt that the black community in the small Mississippi county where the boycott was taking place knew whom Evers was talking about. The Supreme Court held that, despite his express call for violence, and the context of actual violence, Evers's statements were protected, because they were quintessentially political statements made at a public rally, rather than directly to his targets. *See id.* at 928-29, 102 S.Ct. 3409.

If Charles Evers's speech was protected by the First Amendment, then ACLA's speech is also protected.[17] Like Evers, ACLA did not communicate privately with its targets; the statements were made in public fora. And, while ACLA named its targets, it said nothing about

[17] We cannot distinguish this case from *Claiborne Hardware* on the ground that the speech is aimed at impeding abortions, which are constitutionally protected against government interference. The speech in *Claiborne Hardware* likewise sought to prevent lawful conduct – black citizens' patronage of white stores – that the government could not ban without violating the Equal Protection Clause. The Constitution protects rights against government interference; it doesn't justify the suppression of private speech that tries to deter people from exercising those rights.

planning to harm them; indeed, it did not even call on others to do so. This stands in contrast to the words of Charles Evers, who explicitly warned his targets that they would suffer broken necks and other physical harm. Under the standard of *Claiborne Hardware,* the jury's verdict cannot stand.[18]

VACATED and **REMANDED** with instructions that the district court dissolve the injunction and enter judgment for the defendants on all counts.

[18] For precisely the same reasons, the district court could not enjoin the defendants based upon such protected statements. We must therefore vacate the injunction as well.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PLANNED PARENTHOOD OF THE COLUMBIA/ WILLAMETTE, INC., et al., Plaintiffs, v. AMERICAN COALITION OF LIFE ACTIVISTS, et al., Defendants.	Civil Action No. 95-1671-JO **JUDGMENT** (Filed Mar. 13, 2000)

This action came on for trial before the Court and a jury, Honorable Robert E. Jones, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS HEREBY ORDERED AND ADJUDGED AND DECREED that:

1. The "Deadly Dozen" Poster (Trial Exhibit 1) is a true threat by one or more of the defendants to bodily harm, assault or kill one or more of the plaintiffs.

2. The Poster of Dr. Robert Crist (Trial Exhibit 5) is a true threat by one or more of the defendants to bodily harm, assault or kill one or more of the plaintiffs.

3. The Nuremberg Files (Trial Exhibits 7, 9) are a true threat by one or more of the defendants to bodily harm, assault or kill one or more of the plaintiffs.

4. (a) Plaintiff Dr. Robert Crist has final judgment against and recovery from American Coalition for Life ("ACFL") [as a successor to American Coalition for Life

Activists ("ACLA") /s/ REJ] for $39,656.00 in compensatory damages and $2,250,000.00 in punitive damages under the Freedom of Access to Clinic Entrances Act ("FACE");

(b) Plaintiff Dr. Warren Hern has final judgment against and recovery from ACFL, [as a successor to ACLA /s/ REJ] for $14,429.00 in compensatory damages and $1,500,000.00 in punitive damages under FACE;

(c) Plaintiff Dr. Elizabeth Newhall has final judgment against and recovery from ACFL [as a successor to ACLA /s/ REJ] for $15,797.98 in compensatory damages and $2,000,000.00 in punitive damages under FACE;

(d) Plaintiff Dr. James Newhall has final judgment against and recovery from ACFL [as a successor to ACLA /s/ REJ] for $375.00 in compensatory damages and $2,000,000.00 in punitive damages under FACE;

(e) Plaintiff Planned Parenthood of the Columbia/Willamette, Inc. has final judgment against and recovery from ACFL [as a successor to ACLA /s/ REJ] for $405,834.86 in compensatory damages and $6,000,000.00 in punitive damages under FACE; and

(f) Plaintiff Portland Feminist Women's Health Center, doing business as All Women's Health Services, has final judgment against and recovery from ACFL [as a successor to ACLA /s/ REJ] for $50,243.30 in compensatory damages and $3,000,000.00 in punitive damages under FACE.

5. Each plaintiff shall recover the aforementioned damages with interest thereon at the rate as provided by law, 28 U.S.C. § 1961, along with plaintiffs' costs of this action.

6. This Court finds that good cause exists pursuant to 28 U.S.C. § 1963 for plaintiffs to register the Judgment in any district court in which ACFL may reside and/or own property, including in any district court in Virginia.

7. This court retains jurisdiction over this action for all proceedings involving the interpretation, registration and/or enforcement of this Judgment.

DATED this 14 day of ~~February~~ [March /s/ REJ] 2000, *nunc pro tunc* February 22, 1999.

/s/ Robert E. Jones
ROBERT E. JONES
United States District Judge

CERTIFICATE OF SERVICE

This is to certify that on February 11, 2000, a true copy of the foregoing Proposed **JUDGMENT** was served by mail on the following:

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41 F.Supp.2d 1130

United States District Court, D. Oregon.
PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; et al., Plaintiffs,
v.
AMERICAN COALITION OF LIFE ACTIVISTS; et al., Defendants.

No. Civ. 95-1671-JO.

March 16, 1999.

Carol J. Bernick, Davis Wright Tremaine, Portland, OR, Stephen S. Walters, Stoel Rives, Portland, OR, Elizabeth Maringer, Maria T. Vullo, Martin London, Paul Weiss Rifkind Wharton & Garrison, New York City, NY, Roger Evans, Planned Parenthood Federation of America Inc., New York City, NY, for Planned Parenthood of the Columbia/Willamette Inc., plaintiff.

Carol J. Bernick, Davis Wright Tremaine, Portland, OR, Stephen S. Walters, Stoel Rives, Portland, OR, Elizabeth Maringer, Maria T. Vullo, Martin London, Paul Weiss Rifkind Wharton & Garrison, New York City, NY, for Portland Feminist Women's Health Center, Robert Crist, MD, Warren M. Hern, MD, Elizabeth Newhall, MD, James Newhall, MD, Karen Sweigert, MD, plaintiffs.

David T. Daulton, Berean Law Group PC, Norfolk, VA, Kevin L. Gibbs, Olmstead Gibbs & Harper, Seattle, WA, Mark Renart Peck, Law Office of Mark Renart Peck, Morristown, NJ, William D. Bailey, Lake Oswego, OR, for American Coalition of Life Activists, Advocates for Life Ministries, Andrew Burnett, David Crane, Catherine Ramey, Dawn Marie Stover, defendants.

Kevin L. Gibbs, Olmstead Gibbs & Harper, Seattle, WA, Mark Renart Peck, Law Office of Mark Renart Peck, Morristown, NJ, William D. Bailey, Lake Oswego, OR, for Michael Bray, Charles Roy McMillan, Bruce Evan Murch, defendants.

Mark Belz, Belz & Jones PC, St. Louis, MO, Kevin L. Gibbs, Olmstead Gibbs & Harper, Seattle, WA, Michael R. Hirsh, Hirsh & Heuser PC, Canton, GA, Mark Renart Peck, Law Office of Mark Renart Peck, Morristown, NJ, William D. Bailey, Lake Oswego, OR, for Timothy Paul Dreste, Joseph L. Foreman, Charles Wysong, defendants.

Michael P. Tierney, Legal Center for the Defense of Life, New York City, NY, David T. Daulton, Berean Law Group PC, Norfolk, VA, John M. McSherry, Legal Center for Defense of Life, New York City, NY, James M. Bendell, Law Office of James M. Bendell, Port Townsend, WA, Norman L. Lindstedt, Norman L. Lindstedt, PC, Portland, OR, Richard J. Traynor, Law Office Richard J. Traynor, Morristown, NJ, for Michael Dodds, Stephen P. Mears, defendants.

Chris Ferrara, American Catholic Lawyers Association, Fairfield, NJ, James M. Bendell, Norman L. Lindstedt, Norman L. Lindstedt, PC, Portland, OR, Richard J. Traynor, Law Office Richard J. Traynor, Morristown, NJ, for Monica Migliorino Miller, defendant.

Chris Ferrara, American Catholic Lawyers Association, Fairfield, NJ, James M. Bendell, Richard J. Traynor, Law Office Richard J. Traynor, Morristown, NJ, Mark Renart Peck, Law Office of Mark Renart Peck, Morristown, NJ, for Donald Treshman, defendant.

Michael H. Simon, Chin See Ming, Perkins Coie, Portland, OR, for American Civil Liberties Union Foundation of Oregon, Amicus.

Henry Kane, Beaverton, OR, movant pro se.

Paul deParrie, Portland, OR, movant pro se.

AMENDED ORDER AND PERMANENT INJUNCTION

ROBERT E. JONES, District Judge.

Plaintiffs, Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc. and Portland Feminist Women's Health Center, doing business as All Women's Health Services (collectively "plaintiffs"), commenced this action seeking a permanent injunction, damages and other relief. The trial before the jury having been concluded, and the jury having found that defendants did issue true threats against plaintiffs, and this Court having found that plaintiffs are without an adequate remedy at law, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I. *The Threats*

A. *The "Deadly Dozen" Poster*

1. The Deadly Dozen poster, trial exhibit 1, is a true threat to bodily harm, assault, or kill one or more of the plaintiffs.

2. The Deadly Dozen poster was created by the American Coalition of Life Activists ("ACLA") and first published in or around Washington, D.C. on January 22, 1995. (Ex. 1; Tr. 1352, 1385)

3. Defendants Michael Bray, Andrew Burnett, David Crane, Michael Dodds, Joseph Foreman, C. Roy McMillan, Bruce Murch, Catherine Ramey, Dawn Stover, Donald Treshman and Charles Wysong attended the ACLA event where the Deadly Dozen poster was unveiled. (Answer of defendants American Coalition of Life Activists, Advocates for Life Ministries, Michael Bray, Andrew Burnett, David Crane, Timothy Dreste, C. Roy McMillan, Bruce Murch, Catherine Ramey, Dawn Stover and Charles Wysong ("ACLA Answer") ¶ 40; Tr. 1254, 1356, 1493-94) Defendant Dreste ratified the poster's release. (Tr. 1170, 2486) Defendant Advocates for Life Ministries ("ALM") republished the poster in its magazine *Life Advocate*. (Ex. 3) Defendant Murch republished the poster in his publication, *Salt & Light*. (Ex. 2) Defendants also republished the poster at later ACLA events.

4. The Deadly Dozen poster was unveiled at the event in blown-up form. (Tr. 1357)

5. The Deadly Dozen poster lists thirteen physicians. Three of the plaintiffs are specifically named with their place of residence: Dr. Elizabeth Newhall, Dr. James Newhall and Dr. Warren Hern. (ACLA Answer ¶ 41; Ex. 1; Tr. 1254-55)

6. In addition to their names and the city in which they reside, the Deadly Dozen poster lists the home address of Drs. James and Elizabeth Newhall. (ACLA Answer ¶ 41; Ex. 1; Tr. 1254-55)

7. The Deadly Dozen poster lists the name and home address of Dr. George Kabacy, a doctor who at the time provided abortions at plaintiff, Planned Parenthood of the Columbia/Willamette, Inc. ("Planned Parenthood"). (Ex. 1; Tr. 477)

8. Also listed on the Deadly Dozen poster is Dr. Joseph Booker of Jackson, Mississippi, who had been a target of ACLA protests during ACLA's first event in Jackson, Mississippi, in August 1994. (Ex. 1, Tr. 970-71)

9. Also listed on the Deadly Dozen poster is the name and address of Dr. George Tiller of Kansas. Dr. Tiller was shot in both arms in August 1993 by Shelley Shannon of Grants Pass, Oregon. Shannon had been to Wichita before, and had protested Dr. Tiller, along with defendants Andrew Burnett and Catherine Ramey. (Ex. 51) At the time Shannon shot Dr. Tiller, she had in her possession copies of *Life Advocate* magazine (published by defendant ALM) with information about Dr. Tiller. (Tr. 1080) Among those who signed a petition supporting the acquittal of Shannon were defendants ALM, Bray, Burnett, Dodds and McMillan. (Ex. 52; Tr. 1491) Defendant Dawn Stover publicly supported Shannon on national television. (Tr. 2456) In his October 1993 editorial for *Life Advocate*, defendant Burnett stated "Shelley was a courageous women [*sic*] that we were very proud to be associated with." (Ex. 51)

10. The day after the Deadly Dozen poster was released, the Federal Bureau of Investigation contacted the doctors named on the list, notified them of their need to take safety measures and offered 24-hour personal protection of the U.S. Marshal Service for the doctors and their families. (Tr. 568-69) Calls from the U.S. Marshals

and other law enforcement followed. (Tr. 236, 624) Plaintiffs heeded these warnings.

B. *The Poster of Dr. Robert Crist*

11. The Poster of Dr. Robert Crist, trial exhibit 5, is a true threat to bodily harm, assault or kill one or more of the plaintiffs.

12. The Poster of Dr. Robert Crist displays a photograph of Dr. Crist, and his home and business addresses. (ACLA Answer ¶ 48b; Ex. 5; Tr. 1257)

13. The Poster of Dr. Crist was created and first published by ACLA during its event in St. Louis, Missouri in August 1995. (ACLA Answer ¶ 48b; Ex. 5; Tr. 608, 899, 1257)

14. Defendants Andrew Burnett, David Crane, Timothy Dreste, C. Roy McMillan, Catherine Ramey, Dawn Stover and Charles Wysong attended the ACLA event where the Poster of Dr. Crist was unveiled. The other defendants assisted in planning the event and the poster and/or ratified its release. (ACLA Answer ¶ 47c; Tr. 1228, 1257, 1494-95)

15. Immediately after the poster was released, Dr. Crist was informed by the St. Louis police that he should take additional security precautions. (Tr. 1104) Dr. Crist followed that advice. (Tr. 1110)

C. *The Nuremberg Files*

16. The "Nuremberg Files," trial exhibits 7 and 9, are a true threat to bodily harm, assault or kill one or more of the plaintiffs.

17. The Nuremberg Files list the names and contain personal information on abortion providers, clinic employees and clinic owners, law enforcement officials involved in securing access to abortion services, judges, politicians, and abortion rights supporters. (Ex. 7, Tr. 2283)

18. Dr. Robert Crist appears in the Nuremberg Files. (Exs. 7A, 7B, 7C; Tr. 1116-17)

19. Dr. Warren Hern appears in the Nuremberg Files. (Exs. 7A, 7B, 7C) A photograph of Dr. Warren Hern appears in the Nuremberg Files along with the address and telephone numbers of his medical offices. (Exs. 7A, 7E; Tr. 2296)

20. Dr. Elizabeth Newhall appears in the Nuremberg Files. (Exs. 7A, 7B, 7C; Tr. 286)

21. Dr. James Newhall appears in the Nuremberg Files. (Exs. 7A, 7B, 7C)

22. At one time, defendants possessed a hard copy version of the Nuremberg Files, including one of Dr. James Newhall. (Ex. 9) These files have since been destroyed by defendants and/or their agents during the course of this lawsuit and were therefore not produced to plaintiffs.

23. The names of several doctors and employees of plaintiff Planned Parenthood appear in the Nuremberg Files: Dr. George Kabacy (also named on the Deadly Dozen poster), Dr. Mark Nichols (Planned Parenthood's medical director), Dr. Gary Prohaska (a former chair of Planned Parenthood's medical committee), and Allie Stickney (Planned Parenthood's former executive director). (Exs. 7A, 7B, 7C; Tr. 529)

24. The (now former) executive director of plaintiff Portland Feminist Women's Health Center ("Portland Feminist"), Jude Hanzo, is listed and featured in the Nuremberg Files. (Ex. 7A, 7D) The hard copy version of this file has since been destroyed by defendants and/or their agents during the course of this lawsuit and was therefore not produced to plaintiffs.

25. The names of doctors and clinic workers and security personnel who have been killed during attacks on abortion clinics are listed in the Nuremberg Files with strikes through their names. (Ex. 7A; Tr. 2258) Those wounded, such as Dr. Tiller, are shaded in gray. (Ex. 7A; Tr. 2258)

26. The FBI contacted plaintiffs to notify them that they appear in the Nuremberg Files and advised them to take safety precautions. (Ex. 28; Tr. 286-87, 1523)

27. The Nuremberg Files were unveiled in hard copy form by ACLA, with the assistance of Paul deParrie, at ACLA's January 1996 event in Washington, D.C. (Exs. 80, 81, 82; Tr. 1362-63)

28. Defendants Burnett and Crane organized the project with deParrie prior to the event. (Tr. 2815) The other defendants approved of the project and agreed to its commission.

29. Defendants Bray, Burnett, Crane, Dodds, Dreste and Wysong attended the January 1996 ACLA event at which the Nuremberg Files were unveiled. (Tr. 608, 970, 1361, 1495, 2053, 2729) Defendant Murch planned to attend, but at the last minute was unable to attend. (Tr. 2604-05)

30. At the January 1996 ACLA event, a "box" of Nuremberg Files was displayed. (Tr. 2066)

31. The Nuremberg File of Dr. Prohaska was displayed at the January 1996 ACLA Event. (Ex. 4)

32. Soon after the January 1996 ACLA event, Neal Horsley received hard copy Nuremberg Files from Paul deParrie. (Ex. 4; Tr. 424, 2245) Horsley received two shipments of at least 22 hard copy files to be posted on the Internet. (Tr. 2329) These files included the files of Dr. Prohaska and Ms. Hanzo. The defendants have not identified by name the other hard copy files that existed but have since been destroyed.

33. The cover letter on the first shipment of files bore ACLA's name and P.O. box and summarized the Nuremberg Files project. (Tr. 2331) Horsley copied that information when he placed the Nuremberg Files on the Internet.

34. ACLA's name appeared on the Nuremberg Files Internet website in its initial format. (Ex. 7B)

35. The Nuremberg Files website makes it clear that any information kept by ACLA and/or Neal Horsley will be kept away from legal authorities. The website declares: "the evidence collected will be forwarded to several secure locations so that pro-abortion forces will not be able to destroy the evidence and prevent its future use." (Ex. 7B) This statement remained on later versions of the website. (Ex. 7A)

36. After Horsley published the ACLA Nuremberg Files on the Internet, Horsley shipped the hard copy files to an undisclosed location at the request of Paul deParrie. (Tr. 2371)

37. None of the defendants produced any Nuremberg Files during the course of discovery in this lawsuit, despite the fact that they were in defendants possession after this lawsuit was filed in October 1995 and were called for by discovery requests. Neither Horsley nor deParrie produced any Nuremberg Files pursuant to the subpoenas served on them. (Tr. 2374, 2875-76)

II. *Defendants Released Their Threats into a Known Atmosphere of Violence Against Abortion Providers*

38. On March 10, 1993, Dr. David Gunn was shot and killed outside of the Pensacola, Florida clinic where he performed abortions. (ACLA Answer ¶ 55a; Tr. 1258, 2474) Michael Griffin has been convicted of this murder.

39. Prior to his murder, Dr. Gunn's name, photograph and other personal identifying information appeared on WANTED posters. (ACLA Answer ¶ 53; Exs. 11, 12, 13; Tr. 939, 1257, 1497)

40. By January 1995, plaintiffs were aware of this murder and the posters that preceded it. (Exs. 133, 144; Tr. 365, 1508)

41. By January 1995, defendants knew of the murder of Dr. David Gunn and of the posters that preceded his death. (Exs. 57, 133, 144; Tr. 1508)

42. Defendants Michael Bray, Andrew Burnett, David Crane, Michael Dodds, Joseph Foreman, C. Roy McMillan, Catherine Ramey and Dawn Stover signed a "Defensive Action" petition circulated by Paul Hill declaring the murder of Dr. Gunn justifiable and calling for Griffin's acquittal. (Ex. 41A-41D)

43. Defendant Donald Treshman issued a press release on the morning Dr. Gunn was murdered, announcing a fund supporting Michael Griffin. (Ex. 40)

44. Within days of the murder of Dr. Gunn, defendant Timothy Dreste stood outside of an abortion clinic where Dr. Yogendra Shah performed abortions and held up a sign that read: "Dr. Shah, do you feel under the Gunn?" (Ex. 149)

45. On August 21, 1993, Dr. George Patterson, an abortion provider, was shot and killed in Mobile, Alabama. (Foreman Answer ¶ 58; Tr. 356, 1508)

46. Prior to Dr. Patterson's murder, his name, physical description and address were published on a "WANTED" poster. (ACLA Answer ¶ 56a; Ex. 14; Tr. 356, 1258, 1508)

47. Defendants knew of the murder of Dr. Patterson. (Ex. 51)

48. Plaintiffs knew of the murder of Dr. Patterson and the poster that preceded it. (Tr. 357, 1197, 1508)

49. On July 29, 1994, Dr. John Bayard Britton, the doctor who had replaced Dr. Gunn and provided abortions at the same clinic where Dr. Gunn was murdered, was shot and killed along with his volunteer escort, James Barrett, while entering another Pensacola clinic. (ACLA Answer ¶ 68a; Ex. 60; Tr. 1132, 1259, 2503) Mrs. Barrett, James Barrett's wife, was wounded in the attack. (ACLA Answer ¶ 68a; Tr. 761, 1259)

50. Prior to his murder, Dr. Britton's name, photograph and physical description appeared on "unWANTED" posters. (ACLA Answer ¶ 66; Exs. 15, 16, 17; Tr. 771-75,

1258) These posters contained the phrase "Crimes Against Humanity," also found on the Deadly Dozen poster, the Poster of Dr. Robert Crist and the Nuremberg Files. (Exs. 1, 5, 7, 15, 16, 17)

51. Prior to these murders, defendants Burnett and Ramey visited John Burt in Pensacola, Florida. Burt had created the poster of Dr. Gunn and was one of the persons who had also prepared the posters of Dr. Britton along with Paul Hill. They discussed "wanted" posters at this meeting. (Exs. 57, 144; Tr. 785-88) Hill and Burt were videotaped taking photographs for the poster of Dr. Britton. (Ex. 109; Tr. 763-72)

52. Paul Hill has been convicted of the murder of Dr. Britton and Mr. Barrett, and the attempted murder of Mrs. Barrett. (Exs. 60, 109; Tr. 763-64; 770-76, 786)

53. By January 1995, defendants were aware of the murder of Dr. Britton and the posters that preceded it. (Exs. 57, 58, 60, 144; Tr. 947, 958)

54. By January 1995, plaintiffs were aware of the murder of Dr. Britton and the posters that preceded it. (Ex. 144; Tr. 241, 648-49, 1142)

55. Defendants Bray, Burnett, Crane, McMillan, Ramey and Stover signed a petition calling for the acquittal of Paul Hill. (ACLA Answer ¶ 67; Ex. 61; Tr. 1259) The petition was identical to that circulated by Hill in support of Michael Griffin. (Ex. 41)

56. Defendant McMillan, three months after the murder of Dr. Britton, called Paul Hill "a patriot," and a "wonderful man" who had "fired the first shots in this war." (Tr. 791)

57. ALM and its editor-in-chief, Paul deParrie, publicly praised Paul Hill after he was convicted of murder and sentenced to death and encouraged others to follow his lead: "The man's a hero. May his tribe increase." (Ex. 65)

58. These murders were not isolated events. Violence in the anti-abortion movement continued, as chronicled in defendant ALM's magazine *Life Advocate*.

59. In August 1993, just two days prior to the murder of Dr. Patterson, Dr. George Tiller was shot in both arms by Shelley Shannon. (Tr. 1079) Shelley Shannon was a close friend and associate of the defendants. (Tr. 874, 1079-81) Shannon also later pleaded guilty to arson and butyric acid attacks on eight abortion facilities, including Portland Feminist's Eugene, Oregon clinic. (ACLA Answer ¶ 62a; Tr. 1079, 1261)

60. In November 1994, in Vancouver, Canada, Dr. Garson Romalis, an abortion provider, was shot by a sniper with a high-powered rifle at close range. He was having breakfast in his home at the time. (Tr. 637)

61. By January 1995, plaintiffs were aware of the sniper shooting of Dr. Romalis. (Tr. 637-38)

62. By January 1995, defendants were aware of the shooting as well. Defendant Treshman praised the shooting of Dr. Romalis on national television, stating "I would say that that was certainly the superb tactic. It was certainly far better than anything that was seen in the States because the shooting was done in such a way that the perpetrator got away. I would think more abortionists would quit as a result of it." (Ex. 113)

63. Soon thereafter, on December 30, 1994, John Salvi murdered two clinic workers and wounded five others at two clinics in Brookline, Massachusetts. One of the clinics in Brookline was a Planned Parenthood clinic. (Tr. 290-91, 407)

64. Immediately following the shootings in Massachusetts, Salvi drove to Norfolk, Virginia and fired shots into the windows of the Hillcrest Clinic in Norfolk. (Tr. 407, 1339)

65. Defendant David Crane was present outside of the Hillcrest Clinic on the morning John Salvi fired the shots. (Tr. 1340-41)

66. Defendant Michael Bray had been convicted and served four years in federal prison for conspiracy to bomb seven abortion facilities including the Hillcrest Clinic. (Ex. 744; Tr. 1260)

67. More physicians who perform abortions in Canada have been shot by snipers since the sniper shooting of Dr. Romalis.

68. In January 1998, a bomb in Birmingham, Alabama killed an off-duty police officer and maimed a nurse who worked at the clinic.

69. Defendant McMillan referred to the Birmingham bombing as "a righteous act." (Ex. 114) Defendant Bray likewise defended this violence on national television. (Ex. 112)

70. In October 1998, in his home outside of Buffalo, New York, Dr. Barnett Slepian, a doctor who performed abortions, was shot and killed by a sniper. (Tr. 636-37)

71. Dr. Slepian's name is crossed out on the Nuremberg Files website. (Ex. 7A; Tr. 2258-59)

72. Violence against abortion providers has continued through today.

III. *The Defendants*

A. *American Coalition of Life Activists ("ACLA")*

73. ACLA is a coalition of people and organizations that held its first official event in August 1994 in Jackson, Mississippi. ACLA was formed in 1994 following a meeting in Chicago in April 1994 during which there was a split in the pro-life movement over the use of force. Defendants, many of whom had signed the Defensive Action petition approving the murder of Dr. Gunn, refused to commit to non-violence. Because they advocated the use of "force" and justifiable homicide, they were no longer allowed to be leaders of Operation Rescue and therefore agreed to form a new organization that became ACLA. (ACLA Answer ¶ 17c; Tr. 837, 1246, 1474, 1561-64)

74. ACLA's position on violence against abortion providers is clear. In the words of ACLA co-founder and regional director and ALM executive director, defendant Andrew Burnett, "if someone was to condemn any violence against abortion, they probably wouldn't have felt comfortable working with us." (Tr. 829-30)

75. ACLA was founded by defendants Andrew Burnett, Joseph Foreman and C. Roy McMillan. (ACLA Answer ¶¶ 20a, 24a, 25a; Tr. 1247-48, 1251-52)

76. Defendant David Crane is the president and national director of ACLA. (ACLA Answer ¶ 2; Tr. 1245)

77. Defendant Andrew Burnett is the Regional Director of ACLA for the Northwest region. (ACLA Answer ¶ 20a; Tr. 1247-48)

78. Defendant Timothy Dreste is the Regional Director of ACLA for the Central Midwest Region. (ACLA Answer ¶ 22a; Tr. 1251)

79. Defendant Michael Dodds was the Regional Director of ACLA for the South Central Region during the relevant time, and remains an active member of ACLA. (ACLA Answer ¶ 23a; Tr. 1251)

80. Defendant Bruce Murch was a regional director of ACLA for the Northeast Region during the relevant time, and remains an active member of ACLA. (ACLA Answer ¶ 27a; Tr. 1252)

81. Defendant Donald Treshman was a regional director of ACLA for the Southwest region during the relevant time, and remains an active member of ACLA. (ACLA Answer ¶ 31a; Tr. 1253)

82. Defendant Charles Wysong is the Regional Director of ACLA for the Southeast region. (ACLA Answer ¶ 32a; Tr. 1253)

83. Defendant Joseph Foreman drafted the ACLA Constitution. (Tr. 2203)

84. None of the defendants has ever disapproved of or disassociated with the goals or activities of ACLA.

85. In January 1995, ACLA unveiled the Deadly Dozen poster at its event in the Washington, D.C. area. (ACLA Answer ¶ 40a; Ex. 2; Tr. 1254)

86. In August 1995, ACLA unveiled the Poster of Dr. Robert Crist at its event in St. Louis. (ACLA Answer ¶ 48b; Ex. 5; Tr. 1257)

87. At the St. Louis event, ACLA also unveiled and circulated posters of other abortion providers and reproductive health facilities. (Exs. 6, 18, 19, 409; Tr. 1173)

88. Prior to its St. Louis event, ACLA prepared to issue a "Contract on the American Abortion Industry." (Ex. 76)

89. In January 1996, ACLA unveiled the Nuremberg Files, which were subsequently posted on the Internet. (Exs. 80, 81; Tr. 1180, 1361, 1556, 1560)

90. ACLA republished the Deadly Dozen poster at its events in August 1995 and January 1996, and included it in its mailings (Tr. 1180, 1361, 2445)

91. ACLA uses intimidation as a means of interfering with the provision of reproductive health services.

92. Defendant American Coalition of Life Activists ("ACLA") violated or conspired to violate FACE. (Verdict at 3)

93. ACLA is an enterprise that engaged in a pattern of racketeering activity under RICO.

94. ACLA injured each plaintiff in the amount of compensatory damages awarded by the jury. (Verdict at 3)

B. *Advocates for Life Ministries ("ALM").*

95. ALM was involved in the formation of ACLA, coordinates its Northwest region, and is an active ACLA member. (ACLA Answer ¶ 18b; Tr. 838, 1247)

96. ALM provided its telephone and fax numbers and address for ACLA mailings. (Tr. 836, 1055, 1057-58)

97. ALM publishes *Life Advocate* magazine. (ACLA Answer ¶ 18c; Tr. 1247)

98. Andrew Burnett is the executive director of ALM and the publisher of *Life Advocate*. (ACLA Answer ¶ 20b; Tr. 793, 863, 1051, 1248)

99. Defendants Catherine Ramey and Dawn Stover are associate directors of ALM. (ACLA Answer ¶¶ 29a, 30a; Tr. 979, 1252-53, 2429)

100. *Life Advocate*'s editor-in-chief is Paul deParrie. (Tr. 1051, 2511)

101. ALM published defendant Michael Bray's book, *A Time to Kill*. (Exs. 63, 744; Tr. 936-37)

102. According to ALM, defendant Bray's book "shows the connection between the [justifiable homicide] position and clinic destruction and the shootings of abortionists." (Ex. 63)

103. In *Life Advocate*, ALM advertises and sells defendant Bray's "EXECUTE Murderers, Abortionists" bumper stickers. (Exs. 10, 66)

104. Subscribers have asked to be removed from *Life Advocate*'s mailing list because of the magazine's endorsement of the use of force. (Exs. 51, 66, 67, 68; Tr. 1090)

105. ALM republished the Deadly Dozen poster in the March 1995 issue of *Life Advocate*. (Ex. 3)

106. ALM has featured Michael Griffin, Paul Hill and Shelley Shannon on the cover of *Life Advocate* magazine. (Exs. 51, 52, 60; Tr. 916)

107. Shelley Shannon had in her possession several issues of *Life Advocate* featuring articles and photographs of Dr. George Tiller when she shot him in August 1993. (Ex. 45, 47; Tr. 1079-80) Shannon had the magazines so she could identify Dr. Tiller, his vehicle and his clinic. (Tr. 1080)

108. ALM endorsed Shelley Shannon's shooting of Dr. Tiller. (ACLA Answer ¶ 62b; Ex. 51; Tr. 1261)

109. Defendant Ramey, associate director of ALM, destroyed ALM documents and deleted material from ALM's computers since this litigation commenced and plaintiffs served requests for the production of documents on both ALM and Ramey. (Tr. 2513-14)

110. The September 1993 *Life Advocate* noted that an "unwanted poster" of Dr. Britton was in the process of being prepared by Paul Hill and others, and described the activities of Hill and others in identifying and surveilling Dr. Britton. (Ex. 57)

111. In that same article, ALM commented on the murder of Dr. David Gunn, noting that it "sent waves of fear through the ranks of abortion providers across the country. As a result, many more doctors quit out of fear for their lives, and the ones who are left are scared stiff." (Ex. 57)

112. Multiple telephone calls with other defendants to and from ALM's offices took place during the time surrounding ACLA's April 1995 event in Wichita, Kansas. (Ex. 94)

113. Multiple telephone calls with other defendants to and from ALM's office took place during the time surrounding ACLA's August 1995 event, at which the Poster of Dr. Robert Crist was unveiled. (Ex. 94)

114. Multiple telephone calls with other defendants to and from ALM's office took place during the time surrounding ACLA's January 1996 event, at which the Nuremberg Files were unveiled. (Ex. 94)

115. ALM advertised and promoted the White Rose Banquets in *Life Advocate.* (Ex. 79, 84; Tr. 969)

116. ALM advertised and promoted other ACLA events in *Life Advocate.*

117. ALM maintained the hard copy Nuremberg Files at the *Life Advocate* offices during the course of this lawsuit. (Ex. 9; Tr. 978, 2887)

118. ALM uses intimidation as a means of interfering with the provision of reproductive health services.

119. ALM has never disassociated itself with, nor expressed disapproval of, any of ACLA's activities.

120. Defendant Advocates for Life Ministries ("ALM") violated or conspired to violate FACE. (Verdict at 4)

121. ALM violated or conspired to violate RICO. (Verdict at 4)

122. ALM injured each plaintiff in the amount of compensatory damages awarded by the jury. (Verdict at 4)

C. *Michael Bray*

123. Defendant Bray attended the ACLA planning meeting in Bowie, Maryland in November 1994. (Tr. 2029)

124. Defendant Bray attended the ACLA event in Washington, D.C. in January 1995 at which the Deadly Dozen list was unveiled. (ACLA Answer ¶ 40b; Tr. 967, 1254, 1284)

125. At that event, defendant Bray sold copies of his book, *A Time to Kill*. (Tr. 2622)

126. Defendant Bray's book was published by ALM and commissioned by defendant Andrew Burnett. (Tr. 1071)

127. Defendant Bray had multiple telephone discussions with other defendants during the time surrounding ACLA's August 1995 event, at which the Poster of Dr. Robert Crist was unveiled. (Ex. 94)

128. Defendant Bray attended an ACLA planning meeting in Bowie, Maryland in November 1995 prior to ACLA's January 1996 event at which the Nuremberg Files were unveiled. (Tr. 2029)

129. Defendant Bray had multiple telephone discussions with other defendants during the time surrounding ACLA's January 1996 event, at which the Nuremberg Files were unveiled. (Ex. 94)

130. Defendant Bray hosted the annual White Rose Banquets in January 1996 and January 1997 during which ACLA activities were discussed. (Tr. 609-10, 1495)

131. The White Rose Banquet is part of the ACLA January event each year. (Ex. 78, 79, 80, 81, 82, 84)

132. The White Rose Banquet honors people who have been imprisoned for their violent anti-abortion activities. (Tr. 1373)

133. The White Rose calendar, published by defendant Murch and distributed at the White Rose Banquet, contains photos and otherwise commemorates anti-abortion violence and its perpetrators. (Ex. 83)

134. Defendant Bray publishes a newsletter, *Capitol Area Christian News.* (Tr. 601)

135. Defendant Bray, in his September 1993 newsletter, wrote an article describing "unwanted" posters of Dr. John Britton. (Ex. 58; Tr. 611)

136. Defendant Bray signed Paul Hill's petition calling for the acquittal of Shelley Shannon. (Ex. 52)

137. Defendant Bray drafted and signed Paul Hill's justifiable homicide petition calling for the acquittal of Michael Griffin. (Ex. 41; Tr. 604)

138. Defendant Bray drafted and signed an identical justifiable homicide petition calling for the acquittal of Paul Hill. (Ex. 61; Tr. 605)

139. In June 1993, defendant Bray spoke at an event in Oklahoma City sponsored by defendant Treshman in favor of the use of force. (Tr. 894-95)

140. At the Oklahoma City event, defendant Bray displayed a sign reading "EXECUTE Murderers, Abortionists." (Ex. 304; Tr. 894-95)

141. Defendant Bray also created a bumper sticker that states "EXECUTE Murderers, Abortionists." (Ex. 10)

He advertises the bumper sticker in *Life Advocate* as well as in *Capitol Area Christian News.* (Exs. 10, 66)

142. Defendant Bray advocates and promotes the use of force against abortion providers. In a televised interview, he stated "There are times when there is justified killing. We hear of terminating pregnancies. Terminating abortionists, I think is appropriate. Use level language. Human beings, the unborn is a human being. If we are going to speak of terminating pregnancies, we can speak of terminating abortionists." (Ex. 111)

143. In the September 1993 issue of his *Capitol Area Christian News,* Bray discussed one doctor's decision to quit performing abortions following a "Not Wanted" poster prepared and circulated by defendant David Crane and republished in Bray's publication. Bray wrote that although the doctor "declined to give the reason for his decision, it is clear to all who possess faculties capable of inductive analysis: he was bothered and afraid." (Ex. 58)

144. Defendant Bray placed the words "Army of God" on a sign at the Hillcrest Clinic in Norfolk, Virginia, an abortion facility bombed by Bray. (ACLA Answer ¶ 78; Tr. 603)

145. Defendant Bray discussed his copy *Army of God Manual* in the November 1995 *Life Advocate.* In that article, Bray discusses how he "traded" his copy of the *Army of God Manual* for a U.S. Army manual on sniper training. (Ex. 88)

146. Defendant Bray has refused to commit to stop using force in connection with his anti-abortion activities. (Tr. 604)

147. Defendant Bray stated in USA Today: "Anyone who truly believes that the slaughter of children is what we have with abortion could go out and shoot an abortion provider." (Ex. 87)

148. Defendant Bray was present when the Nuremberg Files were unveiled at the January 1996 ACLA event. (Tr. 608)

149. Defendant Bray was part of the discussions with Neal Horsley and others about placing the Nuremberg Files on the Internet. (Tr. 2239)

150. Defendant Bray, in his Fall 1997 issue of *Capitol Area Christian News*, informed his readers that Neal Horsley was collecting names and information for the Nuremberg Files. (Ex. 90)

151. Defendant Bray sees benefits from the atmosphere of violence to which he contributed. In the November 1995 issue of *Life Advocate*, he wrote: "The fact that 3% of the population believes that lethal action against abortionists is justifiable . . . probably 'instills fear' enough to make life-preserving decisions . . . . The fear of the sniper can influence him to consider the end of his life and the judgment to come." (Ex. 88)

152. Defendant Bray uses intimidation as a means of interfering with the provision of reproductive health services.

153. Defendant Bray has never disassociated himself with, nor expressed disapproval of, any of ACLA's activities.

154. Defendant Michael Bray violated or conspired to violate FACE. (Verdict at 5)

155. Defendant Bray injured plaintiffs in the amount of compensatory damages awarded by the jury. (Verdict at 5)

156. Defendant Bray acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

D. *Andrew Burnett*

157. Defendant Burnett is the executive director of defendant ALM. (Tr. 865)

158. Defendant Burnett is a co-founder of ACLA. (ACLA Answer ¶ 20a; Tr. 794-95, 827, 1247-48)

159. Defendant Burnett is a regional director of ACLA. (ACLA Answer ¶ 20a; Tr. 863, 1247-48)

160. Defendant Burnett, together with defendant Joseph Foreman, while in Portland, Oregon, drafted a letter announcing the formation ACLA and circulated it on ACLA letterhead. (Tr. 833)

161. Defendant Burnett signed Paul Hill's justifiable homicide petition calling for the acquittal of Shelley Shannon. (Ex. 52)

162. Defendant Burnett signed Paul Hill's justifiable homicide petition calling for the acquittal of Michael Griffin. (Exs. 41A, B, C, D)

163. Defendant Burnett signed the justifiable homicide petition calling for the acquittal of Paul Hill. (Ex. 61)

164. Defendant Burnett is the publisher of *Life Advocate* magazine, *A Time To Kill*, by Michael Bray, and

In Defense of Others, by Catherine Ramey. (ACLA Answer ¶ 20c; Tr. 793, 937, 1071, 1248)

165. Defendant Burnett has protested at both the home and offices of Dr. Elizabeth Newhall and Dr. James Newhall. (Tr. 892)

166. In June 1998, defendant Burnett violated an injunction ordering him to stay away from Downtown Women's Health Center, the clinic where plaintiffs Dr. Elizabeth Newhall and Dr. James Newhall perform abortions. Defendant Burnett was caught on camera in the hallway outside the Newhalls' office. (Ex. 37, 323; Tr. 856-61)

167. Prior to the entry of that injunction, during a protest outside of the Downtown Women's Center, Burnett attempted to grab the ankles and trip Jane White, co-owner and co-director of Downtown Women's Center. At the time, Ms. White was seven months pregnant. (Tr. 1182, 1185-86)

168. Defendant Burnett attended the event sponsored by defendant Treshman in Oklahoma City in June 1993, at which Burnett and Bray spoke in favor of the use of force. (Ex. 320, Tr. 894)

169. Defendant Burnett attended a meeting in Melbourne, Florida in October 1993 at which the use of force was discussed among the defendants. (Tr. 1471-72)

170. Defendant Burnett attended the meeting in Chicago in April 1994 out of which ACLA was formed. (Tr. 1169)

171. Defendant Burnett attended a planning meeting for the formation of ACLA in the summer of 1994 in St. Louis with defendants Dreste and Foreman. (Tr. 1170)

172. Defendant Burnett attended ACLA's first official event in Jackson, Mississippi in August 1994. (ACLA Answer ¶ 70; Tr. 970, 1254)

173. Defendant Burnett attended the ACLA planning meeting where the Deadly Dozen poster was discussed, in Bowie, Maryland in November 1994. (Tr. 1070)

174. Defendant Burnett participated in an ACLA conference call prior to the January 1995 meeting, to plan the Deadly Dozen poster. (Tr. 2028)

175. Defendant Burnett had multiple telephone discussions with other defendants during the time surrounding ACLA's January 1995 event, at which the Deadly Dozen poster was unveiled. (Ex. 94)

176. Defendant Burnett provided the names and addresses of Drs. Elizabeth and James Newhall and Dr. George Kabacy for the Deadly Dozen poster and helped prepare the poster. (Tr. 956)

177. Defendant Burnett also asked Paul deParrie to provide names for the list. (Tr. 2854)

178. Defendant Burnett attended the ACLA event in Washington, D.C. in January 1995 at which the Deadly Dozen poster was released. (ACLA Answer ¶ 40b; Tr. 1254, 1646)

179. On the day of the release of the Deadly Dozen poster, defendant Burnett publicly stated, referring to Paul Hill: "Looking objectively, I can't say what he did was

wrong. I can't say he stepped outside the bounds of protection that I hope I would get if I were in danger of being killed." (ACLA Answer ¶ 42b; Tr. 1255)

180. Defendant Burnett attended a meeting in St. Louis with defendants Crane and Dreste in the summer of 1995 to plan the August 1995 ACLA event in St. Louis. (Tr. 899, 968)

181. Defendant Burnett attended the ACLA event in St. Louis in August 1995 at which the Poster of Dr. Robert Crist was released. (ACLA Answer ¶ 47c; Ex. 409; Tr. 898)

182. Defendant Burnett attended the ACLA event in Washington, D.C. in January 1996 at which the Nuremberg Files were unveiled. (Tr. 970) Burnett was once in possession of hard copy Nuremberg Files, including one of plaintiff James Newhall. (Ex. 9) Burnett did not produce any of these documents during the course of this litigation although required by plaintiffs' document requests and this Court's discovery orders.

183. Defendant Burnett attended the 1996 White Rose Banquet. (Tr. 1496)

184. Defendant Burnett attended the ACLA event in Washington, D.C. in January 1997. (Tr. 1176)

185. Defendant Burnett understands the danger that "Wanted" or "Guilty" posters pose to the lives of those who provide abortions. He testified in this regard, "I mean, if I was an abortionist, I would be afraid." (Tr. 964)

186. Defendant Burnett himself has been tempted to act violently. He said, "I would have to say that anybody who's involved in pro-life activism has been, you know, confronted with that possibility." (Ex. 108)

187. Defendant Burnett uses intimidation as a means of interfering with the provision of reproductive health services.

188. Defendant Burnett has never disassociated himself with, nor expressed disapproval of, any of ACLA's activities.

189. Defendant Andrew Burnett violated or conspired to violate FACE. (Verdict at 6)

190. Defendant Burnett violated or conspired to violate RICO. (Verdict at 6)

191. Defendant Burnett injured each plaintiff in the amount of compensatory damages awarded by the jury. (Verdict at 6)

192. Defendant Burnett acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

E. *David Crane*

193. Defendant Crane is the national director of ACLA. (ACLA Answer ¶ 21a; Tr. 1250-51, 1268)

194. Defendant Crane attended the meeting in Chicago in April 1994 out of which ACLA was formed. (Tr. 1326)

195. Defendant Crane allied himself with Paul Hill at the Chicago meeting and endorsed the use of deadly force. (Tr. 1326)

196. Defendant Crane signed Paul Hill's justifiable homicide petition calling for the acquittal of Michael Griffin. (Ex. 41C)

197. Defendant Crane signed the justifiable homicide petition calling for the acquittal of Paul Hill. (Ex. 61)

198. Defendant Crane was involved in the formation of ACLA. (Tr. 834)

199. Defendant Crane attended ACLA's first official event in Jackson, Mississippi in August 1994. (ACLA Answer ¶ 70; Tr. 1254)

200. Defendant Crane attended the ACLA organizational meeting in Bowie, Maryland in November 1994, to plan the January 1995 event. (Tr. 2008, 2029)

201. Defendant Crane participated in the ACLA conference call to plan the Deadly Dozen poster. (Tr. 2028)

202. Defendant Crane had multiple telephone discussions with other defendants during the time surrounding ACLA's January 1995 event, at which the Deadly Dozen poster was unveiled. (Ex. 94)

203. Defendant Crane prepared the Deadly Dozen poster and solicited names and other information for the poster from other defendants. (Tr. 1385)

204. Defendant Crane unveiled the Deadly Dozen poster at the ACLA event in January 1995 in blown-up form. (Tr. 1352, 1357)

205. Defendant Crane and ACLA republished the Deadly Dozen poster on several occasions after learning that the physicians on the list had been provided U.S. Marshal protection after the poster was published. (Tr. 1445-46)

206. Defendant Crane attended and spoke at the ACLA event in Wichita, Kansas in April 1995. (Tr. 1299-1300)

207. Defendant Crane attended a meeting in St. Louis in the summer of 1995 to plan the August ACLA event in St. Louis. (Tr. 1299)

208. Defendant Crane distributed a letter inviting people to attend the St. Louis ACLA event. (Tr. 1308)

209. Defendant Crane organized and attended the ACLA event in St. Louis in August 1995 at which the Poster of Dr. Robert Crist was released. (ACLA Answer ¶ 47c; Ex. 409; Tr. 1257, 1303)

210. Defendant Crane assisted in the preparation of the Poster of Dr. Robert Crist. (Tr. 1303, 1312)

211. Defendant Crane had multiple telephone discussions with other defendants during the time surrounding ACLA's January 1996 event, at which the Nuremberg Files were unveiled. (Ex. 94)

212. Defendant Crane presented the Nuremberg Files at an ACLA event in January 1996. (Tr. 1361)

213. Defendant Crane met with defendant Charles Wysong and with Paul deParrie and Neal Horsley to plan the Nuremberg Files Internet project. (Tr. 2682)

214. Defendant Crane attended the 1996 White Rose Banquet. (Tr. 1175, 1376)

215. Defendant Crane organized and attended the ACLA event in Washington, D.C. in January 1997. (Tr. 1176)

216. Defendant Crane attended the 1997 White Rose Banquet. (Tr. 1176; 1363-64)

217. Defendant Crane had multiple telephone discussions with other defendants during the time surrounding ACLA's January 1997 event. (Ex. 94)

218. Defendant Crane had created "Wanted" or "Guilty" – style posters prior to the Deadly Dozen poster, including a poster of Dr. Abraham Anderson. After that poster, Dr. Anderson stopped performing abortions because he feared for his personal security and that of his family. (Tr. 1288-89)

219. Defendant Crane admits that there is no difference in impact between posters headed "Wanted" and those headed "Guilty." (Tr. 1352)

220. Defendant Crane once was the subject of a "Wanted" poster of himself and Paul Hill. Crane kept this Wanted poster in his "death threat" file. (Ex. 21; Tr. 1320)

221. Defendant Crane uses intimidation as a means of interfering with the provision of reproductive health services.

222. Defendant Crane has never disassociated himself with, nor expressed disapproval of, any of ACLA's activities.

223. Defendant David Crane violated or conspired to violate FACE. (Verdict at 7)

224. Defendant Crane violated or conspired to violate RICO. (Verdict at 7)

225. Defendant Crane injured each plaintiff in the amount found in compensatory damages by the jury. (Verdict at 7)

226. Defendant Crane acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

F. *Michael Dodds*

227. Defendant Dodds is a regional director of ACLA. (ACLA Answer ¶ 23a; Tr. 1251, 1946)

228. Defendant Dodds attended the ACLA meeting in Bowie, Maryland in November 1994, to plan the January 1995 event. (Tr. 1945)

229. Defendant Dodds participated in the ACLA conference call to plan the Deadly Dozen poster. (Tr. 1820)

230. Defendant Dodds attended the ACLA event in Washington, D.C. in January 1995 at which the Deadly Dozen poster was released. (Tr. 1947)

231. Defendant Dodds provided Dr. George Tiller's name for the Deadly Dozen poster. (Tr. 1493)

232. Defendant Dodds endorsed Shelley Shannon's 1993 shooting of Dr. Tiller. Dodds signed a petition calling for her acquittal and solicited donations for Shannon's legal defense fund. (Ex. 52; Tr. 1491)

233. Defendant Dodds signed Paul Hill's justifiable homicide petition calling for the acquittal of Michael Griffin. (Exs. 41B, 41C, 41D)

234. Defendant Dodds had multiple telephone discussions with other defendants during the time surrounding ACLA's April 1995 event in Wichita, Kansas. (Ex. 94)

235. Defendant Dodds hosted and spoke about "New Aggressive Boycott Methods" at the ACLA event in Wichita, Kansas in April 1995. (Tr. 1965, 2044-5)

236. Defendant Dodds excluded the media from that part of the Wichita ACLA event because "we basically want to rely on . . . a lack of awareness on the individual's part . . . [t]hey are vulnerable in this area so we can gain information." (Ex. 110; Tr. 2044-46)

237. The Nuremberg Files were discussed at the ACLA Witchita event. (Tr. 2082)

238. Defendant Dodds ratified the release of the Poster of Dr. Robert Crist. (Tr. 1494-95)

239. Defendant Dodds attended a planning meeting of ACLA in Bowie, Maryland in November 1995. (Tr. 2032)

240. Defendant Dodds participated in an ACLA conference call in late 1995, to plan the January 1996 event. (Tr. 1495)

241. Defendant Dodds had multiple telephone discussions with other defendants during the time surrounding ACLA's January 1996 event, at which the Nuremberg Files were unveiled. (Ex. 94)

242. Defendant Dodds attended the ACLA event in Washington, D.C. in January 1996 at which the Nuremberg Files were unveiled. (Tr. 2053)

243. Defendant Dodds attended the 1996 White Rose Banquet wearing a badge reading "Lieutenant Colonel AOG." AOG stands for Army of God, the militant anti-abortion group that published a tract on making lethal weapons for the fight against abortion. (Tr. 2074)

244. Defendant Dodds uses intimidation as a means of interfering with the provision of reproductive health services.

245. Defendant Dodds has never disassociated himself with, nor expressed disapproval of, any of ACLA's activities.

246. Defendant Michael Dodds violated or conspired to violate FACE. (Verdict at 8)

247. Defendant Dodds violated or conspired to violate RICO. (Verdict at 8)

248. Defendant Dodds injured each plaintiff in the amount of compensatory damages awarded by the jury. (Verdict at 8)

249. Defendant Dodds acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

G. *Timothy Paul Dreste*

250. Defendant Dreste is a regional director of ACLA. (ACLA Answer ¶ 22a; Tr. 864, 1251, 1270)

251. Defendant Dreste attended the meeting in Chicago in April 1994 out of which ACLA was formed. (Tr. 1169)

252. At or around the time of that meeting, Dreste and defendants Foreman and Burnett met with approximately 100-120 others and discussed forming a new organization which became ACLA. (Tr. 1169)

253. Defendant Dreste attended the planning meeting for the formation of ACLA in the summer of 1994 with defendants Foreman and Burnett. (Tr. 1170)

254. Defendant Dreste contributed money to Paul Hill's support fund. (Tr. 1169)

255. Defendant Dreste approved of the Deadly Dozen poster. Dreste regretted that Dr. Robert Crist was not one of the doctors named on the poster. (Tr. 1170)

256. Defendant Dreste attended the meeting in the summer of 1995 to plan the August 1995 ACLA event in St. Louis. (Tr. 899)

257. Defendant Dreste emceed the ACLA event in St. Louis in August 1995 at which the Poster of Dr. Robert Crist was released. (Tr. 1173)

258. Defendant Dreste continues to circulate the Poster of Dr. Robert Crist. (Tr. 1173; ¶ 482 *infra*)

259. Defendant Dreste also was involved in the creation and publication at the August 1995 ACLA event of a poster of Reproductive Health Services, the clinic where Dr. Crist works, and posters of Dr. John Stopple, Dr. Yogendra Shah and the clinics where those doctors performed abortions. (Exs. 6, 18, 19; Tr. 1173)

260. Defendant Dreste had multiple telephone discussions with other defendants during the time surrounding

ACLA's January 1996 event, at which the Nuremberg Files were unveiled. (Ex. 94)

261. Defendant Dreste attended the ACLA event in Washington, D.C. in January 1996 at which the Nuremberg Files were unveiled. (Tr. 1175)

262. At that event, defendant Dreste received a $500 simulated check for getting Dr. John Stopple to stop performing abortions just months after ACLA put Dr. Stopple on a poster nearly identical to the Poster of Dr. Crist. (Ex. 18; Tr. 2679-80, 2701-02) The poster was unveiled at the same August 1995 ACLA event at which the Poster of Dr. Crist was unveiled. That fake check was presented by defendant Crane (Tr. 2703)

263. Defendant Dreste attended the ACLA event in Washington, D.C. in January 1997. (Tr. 1175)

264. Defendant Dreste attended the 1996 and 1997 White Rose Banquets. (Tr. 1175-76)

265. When defendant Dreste protests outside St. Louis abortion clinics, he often wears a hat adorned with shotgun shells. (Tr. 1176)

266. One week after the murder of Dr. Gunn, Dreste stood outside of a St. Louis abortion clinic where Dr. Yogendra Shah performed abortions and held up a sign "Dr. Shah, do you feel under the Gunn?" (Ex. 149)

267. Defendant Dreste uses intimidation as a means of interfering with the provision of reproductive health services.

268. Defendant Dreste has never disassociated himself with, nor expressed disapproval of, any of ACLA's activities.

269. Defendant Timothy Dreste violated or conspired to violate FACE. (Verdict at 9)

270. Defendant Dreste violated or conspired to violate RICO. (Verdict at 9)

271. Defendant Dreste injured each plaintiff in the amount of compensatory damages awarded by the jury. (Verdict at 9)

272. Defendant Dreste acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

H. *Joseph Foreman*

273. Defendant Foreman is a co-founder of ACLA. (ACLA Answer ¶ 24a; Tr. 1251, 2193)

274. Defendant Foreman helped draft and signed Paul Hill's justifiable homicide petition calling for the acquittal of Michael Griffin. (Ex. 41A; Tr. 2208)

275. Defendant Foreman attended a meeting in Melbourne, Florida in October 1993 at which the use of force was discussed among defendants. (Tr. 1471-72)

276. Defendant Foreman organized the meeting in Chicago in April 1994 out of which ACLA was formed. (Tr. 2126)

277. Defendant Foreman sent a letter to approximately 500 people announcing the formation of ACLA and encouraging participation. (Tr. 2193)

278. Defendant Foreman drafted the ACLA constitution. (Tr. 2202-03)

279. Defendant Foreman attended a planning meeting for the formation of ACLA in the summer of 1994. (Tr. 2198-2201)

280. Defendant Foreman planned and attended ACLA's first official event in Jackson, Mississippi in August 1994. (Tr. 2134-37)

281. Defendant Foreman attended the ACLA organizational meeting in Bowie, Maryland in November 1994. (Tr. 2029)

282. Defendant Foreman attended the ACLA event in Washington, D.C. in January 1995 at which the Deadly Dozen poster was released. (ACLA Answer ¶ 40b; Tr. 1254)

283. Defendant Foreman attended and spoke at the ACLA event in Wichita, Kansas in April 1995 where Nuremberg Files were discussed. (Tr. 1301, 1494, 2140)

284. Defendant Foreman had multiple telephone discussions with other defendants during the time surrounding ACLA's January 1996 event, at which the Nuremberg Files were unveiled. (Ex. 94)

285. Defendant Foreman has been found by a federal judge to have "bumped, shoved, and slashed or pushed Dr. Morris"; "Dr. Morris sustained some cuts and scratches. The incident also caused both Dr. and Mrs. Morris to suffer mental anguish and stress." Dr. Morris is a doctor in California who performs abortions. (Ex. 474; Tr. 2184)

286. Defendant Foreman uses intimidation as a means of interfering with the provision of reproductive health services.

287. Defendant Foreman has never disassociated himself with, nor expressed disapproval of, any of ACLA's activities.

288. Defendant Joseph Foreman violated or conspired to violate FACE. (Verdict at 10)

289. Defendant Foreman violated or conspired to violate RICO. (Verdict at 10)

290. Defendant Foreman injured each plaintiff in the amount of compensatory damages awarded by the jury. (Verdict at 10)

291. Defendant Foreman acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

I. *Charles Roy McMillan*

292. Defendant McMillan is a co-founder and prominent member of ACLA. (ACLA Answer ¶ 25a; Tr. 125[2])

293. Defendant McMillan, in *Life Advocate* magazine and elsewhere, lied about having served as an infantry officer in Vietnam. In the article entitled, "Two Killers in this House, and We Sleep Fine, Thank You," McMillan asserted that he had killed hundreds of his "enemies" in Vietnam. (Tr. 1228) McMillan made these statements to intimidate abortion providers.

294. Defendant McMillan attended a meeting in Melbourne, Florida in October 1993 at which the use of force was discussed among defendants. (Tr. 1471-72)

295. Defendant McMillan attended a dinner at Paul Hill's house on the eve of Michael Griffin's trial for the murder of Dr. Gunn. Defendants Bray, Burnett and Crane were there as well. All agreed that the murder of Dr. Gunn was "justifiable homicide." (Tr. 1221)

296. Defendant McMillan signed Paul Hill's petition calling for the acquittal of Shelley Shannon. (Ex. 52)

297. Defendant McMillan signed Paul Hill's justifiable homicide petition calling for the acquittal of Michael Griffin. (Exs. 41A, B, C, D; Tr. 1222)

298. Defendant McMillan signed the justifiable homicide petition calling for the acquittal of Paul Hill. (Ex. 61)

299. McMillan has publicly stated that it is justifiable and righteous not only to kill physicians who provide abortions, but also anyone else who is involved in the provision of abortion or supports abortion rights. (Tr. 1225)

300. Defendant McMillan attended the meeting in Chicago in April 1994 out of which ACLA was formed. (Tr. 1472)

301. Defendant McMillan hosted ACLA's first official event in Jackson, Mississippi in August 1994, where Dr. Joseph Booker was targeted. (Tr. 971, 2203)

302. Defendant McMillan had multiple telephone discussions with other defendants during the time surrounding ACLA's January 1995 event, at which the Deadly Dozen poster was unveiled. (Ex. 94)

303. Defendant McMillan attended the ACLA event in Washington, D.C. in January 1995 at which the Deadly Dozen poster was released. (ACLA Answer ¶ 40b; Tr. 1254)

304. Defendant McMillan provided the name of Dr. Joseph Booker to David Crane for the Deadly Dozen poster. (Tr. 1228)

305. Defendant McMillan attended the ACLA event in St. Louis in August 1995 at which the Poster of Dr. Robert Crist was released. (ACLA Answer ¶ 47c; Tr. 1257)

306. Defendant McMillan invoked the Fifth Amendment when asked if he had ever damaged an abortion clinic. (Tr. 1228-29)

307. Defendant McMillan advocates and promotes violence against abortion providers and abortion clinic workers. He has stated "those employees choose to work in a place where human beings are being killed. They choose to enter the killing zone and they need to understand and be warned that people who choose to kill and be accessories to murder may very well have violence done against them to stop the violence they are perpetrating on human beings in the womb." (Answer ¶ 79; Tr. 1255)

308. Defendant McMillan praised the bombing of a Birmingham, Alabama abortion clinic where a police officer was killed and a nurse was critically injured, declaring, "I think it was a righteous act." (Ex. 114)

309. Defendant McMillan, in discussing the anti-abortion movement, stated "more violence is inevitable and it is righteous. It wouldn't bother me if every abortionist in the country today fell dead from a bullet." (ACLA Answer ¶ 45a; Tr. 1224, 1256)

310. Defendant McMillan believes violence is justified. He believes in "killing people in just wars, and there is a war in the womb." (Tr. 1225)

311. Defendant McMillan, three months after the murder of Dr. Britton, called Paul Hill "a patriot," and a "wonderful man" who had "fired the first shots in this war." (Tr. 791)

312. Defendant McMillan believes it is acceptable to shoot a pregnant abortion provider because "if you have to sacrifice an innocent to save many, it would be alright." (Tr. 1225)

313. Defendant McMillan believes it would be justifiable to kill the President and the Justices on the U.S. Supreme Court who support abortion rights. (Tr. 1225)

314. Defendant McMillan uses intimidation as a means of interfering with the provision of reproductive health services.

315. Defendant McMillan has never disassociated himself with, nor expressed disapproval of, any of ACLA's activities.

316. Defendant Charles Roy McMillan violated or conspired to violate FACE. (Verdict at 11)

317. Defendant McMillan violated or conspired to violate RICO. (Verdict at 11)

318. Defendant McMillan injured each plaintiff in the amount of compensatory damages awarded by the jury. (Verdict at 11)

319. Defendant McMillan acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

J. *Bruce Murch*

320. Defendant Murch is a regional director of ACLA. (ACLA Answer ¶ 27a; Tr. 1252, 2641)

321. Defendant Murch saved in his files a document that states "abortion clinics should be destroyed." (Ex. 454)

322. Defendant Murch has stated that the murder of Dr. Gunn was justifiable homicide. (Tr. 2716)

323. Defendant Murch attended the meeting in Chicago in April 1994 out of which ACLA was formed. (Tr. 2576)

324. Defendant Murch had multiple telephone discussions with other defendants during the time surrounding ACLA's January 1995 event, at which the Deadly Dozen poster was unveiled. (Ex. 94)

325. Defendant Murch attended and spoke at the ACLA event in Washington, D.C. in January 1995 at which the Deadly Dozen poster was released. (ACLA Answer ¶ 40b; Tr. 1254, 2592)

326. Defendant Murch provided the names and addresses of the two doctors from the Northeast region for the Deadly Dozen poster. (Tr. 2592)

327. Defendant Murch republished the Deadly Dozen poster in his newsletter *Salt & Light* after being made aware that physicians on this poster had been provided U.S. Marshal protection. He circulated his newsletter with the Deadly Dozen poster to 700 people. (Ex. 2; Tr. 2625)

328. Defendant Murch attended the meeting in St. Louis in the summer of 1995 to plan the ACLA event in St. Louis in August 1995. (Tr. 1171)

329. Defendant Murch ratified the release of the Poster of Dr. Robert Crist. (Tr. 2644)

330. Defendant Murch attended the ACLA planning meeting in Bowie, Maryland in November 1995. (Tr. 2586)

331. Defendant Murch printed the 1996 White Rose calendar. (Ex. 83; Tr. 2607)

332. Defendant Murch also printed Michael Bray's newsletter, *Capitol Area Christian News.*

333. Defendant Murch planned to attend the January 1996 ACLA event where the Nuremberg Files were unveiled, but at the last minute was unable to attend. (Tr. 2604-05)

334. Defendant Murch compared himself and ACLA to the militant wing of the black power movement that advocated "violent overthrow by blacks," in contrast to the pacifist wing of the civil rights movement led by Dr. Martin Luther King, Jr. (Tr. 2632)

335. Defendant Murch believes that there is a difference between the use of force and violence. He considers the use of "force" legitimate. (Tr. 2365-66)

336. Defendant Murch uses intimidation as a means of interfering with the provision of reproductive health services.

337. Defendant Murch has never disassociated himself with, nor expressed disapproval of, any of ACLA's activities.

338. Defendant Bruce Murch violated or conspired to violate FACE. (Verdict at 12)

339. Defendant Murch violated or conspired to violate RICO. (Verdict at 12)

340. Defendant Murch injured each plaintiff in the amount of compensatory damages awarded by the jury.

341. Defendant Murch acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

K. *Catherine Ramey*

342. Defendant Ramey is the associate director of defendant ALM and the associate editor of *Life Advocate* magazine. (ACLA Answer ¶¶ 29a, 29c; Tr. 1252, 2470)

343. Defendant Ramey edited Paul Hill's article in *Life Advocate* entitled "Who Killed the Innocent, Michael Griffin or David Gunn?" Ramey titled the final section of the article, "A Call to Specific Action," referring to killing abortion providers. (Ex. 320; Tr. 2501-02) The Paul Hill

article was published the month before Shelley Shannon shot Dr. Tiller. (Tr. 2502)

344. Defendant Ramey wrote *In Defense of Others.*

345. Defendant Ramey edited defendant Bray's book, *A Time to Kill.*

346. Former ALM subscribers who read defendant Ramey's articles in *Life Advocate* concluded that she was advocating violence and perhaps was potentially violent herself. (Ex. 66)

347. Defendant Ramey signed Paul Hill's justifiable homicide petition calling for the acquittal of Michael Griffin. (Exs. 41A, B, C, D; Tr. 2503-04)

348. Defendant Ramey signed the justifiable homicide petition calling for the acquittal of Paul Hill. (Ex. 61; Tr. 2484)

349. Defendant Ramey is aware that certain people in the pro-life movement believe that Paul Hill and Michael Griffin should be executed for what they did. She has stated that that position is shameful. (Tr. 1088)

350. Defendant Ramey attended the Chicago meeting in April 1994 out of which ACLA was formed. (Tr. 1472)

351. Defendant Ramey attended the ACLA event in Washington, D.C. in January 1995 at which the Deadly Dozen poster was released. (Cite)

352. Defendant Ramey attended the ACLA event in St. Louis in August 1995 at which the Poster of Dr. Robert Crist was released. (ACLA Answer ¶ 47c; Tr. 899, 1257)

353. Ramey has promoted ACLA's message. (ACLA Answer ¶ 29g)

354. Defendant Ramey was in possession of the hard copy Nuremberg Files when they were maintained at ALM's offices during the course of this lawsuit, prior to their destruction. (Ex. 9)

355. Defendant Ramey, associate director of ALM, destroyed ALM documents and deleted material from ALM's computers since this litigation commenced and plaintiffs served requests for the production of documents on both ALM and Ramey. (Tr. 2513-14)

356. Defendant Ramey put on her car a bumper sticker that reads "EXECUTE Murderers/Abortionists" in the hope that her "car will exude a sense of justice that will cause a killer to question his security, temporal and eternal." (Ex. 379)

357. Defendant Ramey has stated that it is a good thing when abortion providers are shot. She declared "I would not hold out a Kleenex where an abortion provider shot. I – I think that there is an element of justice that is undeniable, and whether we recognize that legally or not . . . there is an element of justice." (Tr. 2505-06)

358. Defendant Ramey uses intimidation as a means of interfering with the provision of reproductive health services.

359. Defendant Ramey has never disassociated herself with, nor expressed disapproval of, any of ACLA's activities.

360. Defendant Catherine Ramey violated or conspired to violate FACE. (Verdict at 13)

361. Defendant Ramey violated or conspired to violate RICO. (Verdict at 13)

362. Defendant Ramey injured each plaintiff in the amount of compensatory damages awarded by the jury. (Verdict at 13)

363. Defendant Ramey acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

L. *Dawn Stover*

364. Defendant Stover is the associate director of ALM. (ACLA Answer ¶ 30a; Tr. 1253, 2427)

365. Defendant Stover is an active participant in the activities of the Northwest Region of ACLA. (ACLA Answer ¶ 30a; Tr. 1253)

366. Defendant Stover attended a meeting in Melbourne, Florida in October 1993 at which the use of force was discussed among defendants. (Tr. 1471-2)

367. Defendant Stover attended the Chicago meeting in April 1994 out of which ACLA was formed. (Tr. 2451)

368. Defendant Stover attended the ACLA planning meeting in Bowie, Maryland in November 1994. (Tr. 1492-93)

369. Defendant Stover attended and was the media spokesperson for ACLA at the ACLA event in Washington, D.C. in January 1995 at which the Deadly Dozen poster was released. (ACLA Answer ¶ 40b; Tr. 1254, 2431)

370. Defendant Stover attended the ACLA event in St. Louis in August 1995 at which the Poster of Dr. Robert Crist was released. (Tr. 2443)

371. Defendant Stover signed Paul Hill's justifiable homicide petition calling for the acquittal of Michael Griffin. (Ex. 41D)

372. Defendant Stover signed the justifiable homicide petition calling for the acquittal of Paul Hill. (Ex. 61)

373. Defendant Stover's parents-in-law, former subscribers to *Life Advocate*, concluded that ALM's staff, which includes Stover, supports murder of abortion providers. (Ex. 68)

374. Defendant Stover, after Shelley Shannon shot Dr. Tiller and Michael Griffin murdered Dr. Gunn, appeared with Paul Hill on ABC's *Nightline*. Stover stated: "I do believe that if her [Shelley Shannon's] intent was to save the children that George Tiller was going to kill that day, then Shelley, in my eyes, is a heroine." (Tr. 2455-56)

375. Defendant Stover uses intimidation as a means of interfering with the provision of reproductive health services.

376. Defendant Stover has never disassociated herself with, nor expressed disapproval of, any of ACLA's activities.

377. Defendant Dawn Stover violated or conspired to violate FACE. (Verdict at 14)

378. Defendant Stover violated or conspired to violate RICO. (Verdict at 14)

379. Defendant Stover injured each plaintiff in the amount of compensatory damages awarded by the jury. (Verdict at 14)

380. Defendant Stover acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

M. *Donald Treshman*

381. Defendant Treshman is a regional director of ACLA. (ACLA Answer ¶ 31a; Tr. 1253, 1496)

382. In May 1993, when defendant Treshman learned that Dr. Robert Crist planned to practice medicine regularly at a Planned Parenthood clinic in Kansas City, Missouri, Treshman stated "we have been assured that he [Dr. Crist] will be monitored and that appropriate action will be taken." (ACLA Answer ¶ 59; Tr. 1260)

383. Defendant Treshman organized and sponsored an event in Oklahoma City in June 1993 at which Michael Bray and Andrew Burnett spoke in favor of the use of force. (Ex. 320; Tr. 894)

384. Defendant Treshman knew that before Dr. Gunn's murder in 1993, a wanted poster of Dr. Gunn had been circulated in Pensacola, Florida where Dr. Gunn lived and worked. (Tr. 1497)

385. On the morning of Dr. Gunn's murder, defendant Treshman issued a press release endorsing the murder and calling for donations for Michael Griffin's defense. (Ex. 40)

386. Defendant Treshman attended the meeting in Chicago in April 1994 out of which ACLA was formed. (Tr. 1472)

387. Defendant Treshman assisted in the formation of ACLA. (Tr. 834)

388. Defendant Treshman provided the name of Dr. Douglas Karpen for the Deadly Dozen poster. (Tr. 1493)

389. Defendant Treshman attended the ACLA event in Washington, D.C. in January 1995 at which the Deadly Dozen poster was released. (ACLA Answer ¶ 40b; Tr. 1254, 1493)

390. Treshman's *Newsline* announced in January 1995 that immediately after release of the Deadly Dozen poster, the physicians on the poster were offered U.S. Marshal protection. (Ex. 71)

391. Defendant Treshman was a featured speaker at ACLA events. (Tr. 1300)

392. Defendant Treshman had multiple telephone discussions with other defendants during the time surrounding ACLA's August 1995 event, at which the Dr. Crist poster was unveiled. (Ex. 94)

393. Defendant Treshman received a letter from David Crane regarding the St. Louis event in August 1995 and the Poster of Dr. Robert Crist. (Ex. 76)

394. Defendant Treshman attended the ACLA planning meeting in November 1995. (Tr. 2645)

395. Defendant Treshman had multiple telephone discussions with other defendants during the time surrounding ACLA's January 1996 event, at which the Nuremberg Files were unveiled. (Ex. 94)

396. Defendant Treshman advocates and promotes the use of force. In reference to the sniper shooting of abortion provider Dr. Garson Romalis in Canada in November 1994, Treshman stated "I would say that was certainly the superb tactic. It was certainly far better than anything that was seen in the States. Because the shooting was done in such a way that the perpetrator got away. I would think more abortionists would quit as a result of it." (Ex. 113)

397. Defendant Treshman uses intimidation as a means of interfering with the provision of reproductive health services.

398. Defendant Treshman has never disassociated himself with, nor expressed disapproval of, any of ACLA's activities.

399. Defendant Donald Treshman violated or conspired to violate FACE. (Verdict at 15)

400. Defendant Treshman injured each plaintiff in the amount of compensatory damages awarded by the jury. (Verdict at 15)

401. Defendant Treshman acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

N. *Charles Wysong*

402. Defendant Wysong is a regional director of ACLA. (ACLA Answer ¶ 32a; Tr. 1253, 2671)

403. Defendant Wysong attended the ACLA event in Washington, D.C. in January 1995 at which the Deadly Dozen poster was released. (Tr. 1493-94)

404. Defendant Wysong provided defendant Crane with names of physicians for the Deadly Dozen poster. (Tr. 2671)

405. Defendant Wysong attended and spoke at the ACLA event in Wichita, Kansas in April 1995. (Tr. 2044, 2672)

406. Defendant Wysong attended the meeting in St. Louis in the summer of 1995 to plan the August 1995 ACLA event in St. Louis. (Tr. 968)

407. Defendant Wysong attended the ACLA event in St. Louis in August 1995 at which the Poster of Dr. Robert Crist was released. (ACLA Answer ¶ 47c; Ex. 409; Tr. 899, 1257)

408. Defendant Wysong prepared the Poster of Dr. Robert Crist with the assistance of defendants Burnett, Crane and Dreste. (Tr. 2736)

409. Defendant Wysong attended the ACLA planning meeting in Bowie, Maryland in November 1995. (Tr. 2645)

410. Defendant Wysong had multiple telephone discussions with other defendants during the time surrounding ACLA's January 1996 event, at which the Nuremberg Files were unveiled. (Ex. 94)

411. Defendant Wysong attended and spoke at an ACLA event in Washington, D.C. in January 1996 at which the Nuremberg Files were unveiled. (Ex. 79; Tr. 2679)

412. Defendant Wysong attended the 1996 White Rose Banquet. (Tr. 2350)

413. Defendant Wysong met with defendant David Crane, Paul deParrie and Neal Horsley to plan the Nuremberg Files Internet project. (Tr. 2682)

414. Defendant Wysong attended and spoke at the ACLA event in Washington, D.C. in January 1997. (Tr. 1181)

415. Defendant Wysong attended the 1997 White Rose Banquet. (Tr. 1181, 2388)

416. Defendant Wysong was keenly aware of the effect posters such as the Deadly Dozen poster, the Poster of Dr. Robert Crist and the Nuremberg Files would have. He stated: "Listening to what abortionists said, abortionists who have quit the practice who are no longer killing babies but are now pro-life. They said the two things they feared the most were being sued for malpractice and having their picture put on a poster." (Tr. 1178)

417. Defendant Wysong uses intimidation as a means of interfering with the provision of reproductive health services.

418. Defendant Wysong has never disassociated himself with, nor expressed disapproval of, any of ACLA's activities.

419. Defendant Charles Wysong violated or conspired to violate FACE. (Verdict at 16)

420. Defendant Wysong violated or conspired to violate RICO. (Verdict at 16)

421. Defendant Wysong injured each plaintiff in the amount of compensatory damages awarded by the jury. (Verdict at 16)

422. Defendant Wysong acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

IV. *Paul deParrie and Neal Horsley are Agents of the Defendants and Participated in the Destruction of Documents*

423. Paul deParrie is an agent of defendants ACLA, ALM and Burnett.

424. Neal Horsley is an agent of defendants ACLA, Michael Bray, Andrew Burnett, David Crane and Charles Wysong.

425. Horsley and deParrie conspired with the defendants in connection with the preparation and publication of the Nuremberg Files.

426. Horsley and deParrie conspired with defendants to obstruct justice by destroying or assisting in concealing the hard copy versions of Nuremberg Files so that they would not be available to plaintiffs or the Court.

427. DeParrie is the editor-in-chief of ALM's *Life Advocate* magazine, published by Andrew Burnett. (Tr.

2791-92) DeParrie selects the news stories and commentaries that run in the magazine each month. (Tr. 2798)

428. DeParrie leads ALM events. (Tr. 2813-14, 2863)

429. DeParrie was once jailed for violating an injunction entered against ALM. (Tr. 2860)

430. DeParrie, at defendant Burnett's request, provided names of doctors for the Deadly Dozen Poster. (Tr. 2854)

431. DeParrie attended the January 1996 and January 1997 ACLA events in Washington D.C. (Tr. 2815-20).

432. DeParrie attended the White Rose Banquets in January 1996 and January 1997. (Tr. 2819-20)

433. DeParrie brought hard copy Nuremberg Files from ALM's offices to the January 1996 ACLA event, at which deParrie was a featured speaker and gave a presentation on the Nuremberg Files along with defendant Crane. (Tr. 2865)

434. DeParrie discussed creating the Nuremberg Files with defendants Burnett, Crane and Wysong. (Tr. 2815, 2819-20, 2682-83)

435. DeParrie, Neal Horsley and defendants Bray, Crane and Wysong conceived of putting the Nuremberg files on the Internet.

436. In 1997, as discovery in this case was proceeding, deParrie provided Neal Horsley's telephone number to David Crane and informed Horsley that Crane would be calling him about removing ACLA's name from the Nuremberg Files. (Tr. 2834)

437. The hard copy version of Dr. James Newhall's Nuremberg Files was broadcast on a television program that showed defendants Burnett and Ramey, along with Paul deParrie, compiling Dr. Newhall's file at defendant ALM's Portland offices. (Ex. 9)

438. Paul deParrie took the photographs of Dr. James Newhall and his home for the Nuremberg Files during an ALM protest outside of Dr. Newhall's home in late 1994. (Tr. 893, 2844)

439. DeParrie did not produce this or any other Nuremberg File (or any other file on abortion providers) in response to a subpoena calling for their production in this case. (Tr. 2875-76)

440. Horsley did not produce this or any other Nuremberg File (or any other file on abortion providers) in response to a subpoena calling for their production in this case. (Tr. 2374)

441. Horsley manages the Nuremberg Files on the Internet as an agent and co-conspirator of defendant. (Tr. 1556)

442. Horsley publishes defendant Bray's *Capitol Area Christian News* on his website. (Tr. 2239)

443. The Nuremberg Files are linked to *Life Advocate* on Horsley's website. (Ex. 8)

444. Horsley has testified inconsistently about whether he attended the 1996 or 1997 White Rose Banquet in order to offer his "services," to defendants. (Tr. 2238, 2335-36)

445. Horsley offered his website services specifically to defendants Crane and Bray. (Tr. 2349)

446. Defendant Bray announced at his White Rose Banquet that Horsley was developing websites. (Tr. 2239)

447. The Internet format for the Nuremberg Files was conceived by Crane, Wysong, deParrie and Horsley. (Tr. 2682-83)

448. Horsley did what he was told with regard to the hard copy and Internet versions of the Nuremberg Files. He stated, "When I work for someone, I do what they tell me to do, and I'm scrupulous in making sure that what I'm doing is in harmony with what they want." (Tr. 2250)

449. Soon after the ACLA event, Horsley received hard copies of the Nuremberg Files to be posted in the Internet. The cover letter with the files Horsley received contained ACLA's name and other text for the Nuremberg Files. (Tr. 2331)

450. Horsley and deParrie conspired to obstruct justice by destroying or assisting in concealing the hard copy versions of Nuremberg Files, in order to assist the defendants in this case.

451. Horsley shipped the hard copy files off to an undisclosed location at the request of deParrie, who did not want them discovered in this or any other litigation. "I think that these things could be seized from people's houses, under various kinds of court orders and stuff, and then it would be gone, and we wouldn't have any recourse . . . I don't want to know where it is, and I am just hoping that it will resurface if we ever get the chance to have [Nuremberg] trials." (Tr. 2891-92)

452. In sending the files to this undisclosed location, Horsley understood that "the best thing to do with them was to – to send them somewhere where nobody knew where they were, including me." (Tr. 2309) Horsley remained confused about why he should send away material he had just posted on the Internet, but complied anyway: "I was thinking that I was cooperating with deParrie's idea. Even though I thought it was a little bit dufus, but you know, I am with the program." (Tr. 2312)

453. Horsley claims to have forgotten any information about where he sent the files. "I purposely basically filed it away back there somewhere, you know, because I – the whole idea was that this is something that probably is best not to be remembered." (Tr. 2373) DeParrie denied that he asked Horsley to discard the files, but I find that testimony – as well as the testimony of the other defendants about the location of the Nuremberg Files – to be not credible.

V. *Adequacy of Remedy*

454. As a result of the defendants' issuance of these threats, plaintiffs have undertaken a variety of security measures in order to ensure their safety.

455. Based upon the evidence admitted at trial, the Court finds that plaintiffs remain threatened by the defendants' threats, and thus have no adequate remedy at law.

CONCLUSIONS OF LAW

456. From my independent review of the evidence produced at trial, from which I have made the above

findings of fact, I conclude that plaintiffs have proven with clear and convincing evidence that each defendant, acting independently and as a co-conspirator, prepared, published and disseminated the Deadly Dozen poster, the Poster of Dr. Robert Crist and the Nuremberg Files.

457. I find that each defendant acted with specific intent and malice in a blatant and illegal communication of true threats to kill, assault or do bodily harm to each of the plaintiffs and with the specific intent to interfere with or intimidate the plaintiffs from engaging in legal medical practices and procedures. The term "threaten" as used hereafter incorporates this definition.

458. I totally reject the defendants' attempts to justify their actions as an expression of opinion or as a legitimate and lawful exercise of free speech in order to dissuade the plaintiffs from providing abortion services.

459. The Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248, provides that in an action brought by a "person aggrieved" by threats of force, "the court may award appropriate relief, including temporary, preliminary, permanent injunctive relief and compensatory and punitive damages, as well as costs of suit and reasonable fees for attorneys. . . ." 18 U.S.C. § 248(c)(1)(B). In its verdict, the jury found each defendant liable under FACE and awarded each plaintiff compensatory and punitive damages against each defendant.

460. FACE provides this Court with express statutory authority for injunctive relief, and the substantial evidence of continuing harm to plaintiffs from defendants' unlawful threats provides clear factual and equitable bases for issuance of an injunction. In light of that authority, the general equitable authority of the Court, and the

Court's findings concerning the grave threat to each plaintiff's security and the likelihood of continuing harm from each defendant, on February 25, 1999, I issued a permanent injunction enjoining defendants from continuing their unlawful threats that place plaintiffs' lives in peril, and binding the defendants' agents, and those persons in active concert or participation with them. I now enter this amended order and permanent injunction, *nunc pro* tunc February 25, 1999. See Fed.R.Civ.P. 65(d).

461. Plaintiffs are entitled to permanent injunctive relief because they lack an adequate remedy at law. *See Continental Airlines, Inc. v. Intra Brokers, Inc.*, 24 F.3d 1099, 1104 (9th Cir.1994). Each day, plaintiffs' lives and security are endangered because of defendants' unlawful threats against them. Monetary relief alone cannot address that harm. This Court has, therefore, the obligation to fashion equitable relief to protect the plaintiffs rights.

462. In deciding whether to grant permanent injunctive relief, the Court considers the balance of hardships or equities – weighing on one hand the harm to plaintiffs if the Court declines to prohibit the defendants' threats, and on the other hand the harm to defendants from an injunction ordering them to cease these activities. *See, e.g., Continental Airlines*, 24 F.3d at 1105; *Laerdal*, 73 F.3d at 857. I find that the balance of hardships weighs overwhelmingly in plaintiffs' favor. In the absence of an injunction, plaintiffs will continue to live as they did before the trial: clad in bulletproof vests and disguises, borrowing cars and varying routes to avoid detection, and constantly in fear of the bodily harm with which they have been threatened.

463. By contrast, the prohibition of unlawful activities imposes no burden on defendants. Defendants may protest abortion using legitimate, lawful means.

464. The scope and terms of an injunction are determined by the extent of the underlying violation. *See Califano v. Yamasaki*, 442 U.S. 682, 702, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). This Court possesses great discretion in crafting an injunction and may frame it to "bar future violations likely to occur." *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1021-22 (9th Cir.1985) (citation omitted).

465. The law requires a higher level of scrutiny and proof for an injunction involving speech than for an award of damages for violation of a statute. *See Madsen v. Women's Health Center*, 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994). I find the actions of the defendants in preparing, publishing and disseminating these true threats objectively and subjectively[1] were not protected speech under the First Amendment. Therefore, the Court issues the following permanent injunction against each defendant, their agents and those in active concert or participation with them, and specifically against Paul DeParrie, an employee and agent of defendant Advocates for Life Ministries, who conspired with Neal Horsley of Carrollton, Georgia, to provide the specific information for

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[1] For purposes of this Order and Preliminary Injunction, I consider a person to make a "true threat" when the person makes a statement that, in context, a reasonable listener would interpret as communicating a serious expression of an intent to inflict or cause serious harm on or to the listener (objective); and the speaker intended that the statement be taken as a threat that would serve to place the listener in fear for his or her personal safety, regardless of whether the speaker actually intended to carry out the threat (subjective).

the Nuremberg Files and who thereafter obstructed justice by destroying or assisting in concealing the materials he provided to Horsley to convert into true threats on his web site.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

PERMANENT INJUNCTION

1. Under the equitable powers of this Court and the Court's authority granted under the Freedom of Access to Clinics Entrances Act ("FACE"), 18 U.S.C. § 248, defendants AMERICAN COALITION OF LIFE ACTIVISTS, ADVOCATES FOR LIFE MINISTRIES, MICHAEL BRAY, ANDREW BURNETT, DAVID CRANE, MICHAEL DODDS, TIMOTHY PAUL DRESTE, JOSEPH L. FOREMAN, CHARLES ROY MCMILLAN, BRUCE EVAN MURCH, CATHERINE RAMEY, DAWN MARIE STOVER, DONALD TRESHMAN and CHARLES WYSONG (collectively "defendants"), and their agents and all persons in active concert or participation with any of them who receive actual notice of this Order and Permanent Injunction or the "Notice" attached as Exhibit A to this Order, are hereby immediately and permanently ENJOINED and RESTRAINED from committing any of the following acts or aiding, abetting, directing or facilitating others to commit or conspiring with any others to commit the following acts:

(a) Threatening, with the specific intent to do so, Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing

business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients, or attorneys, in violation of the Freedom of Access to Clinics Entrances Act ("FACE"), 18 U.S.C. § 248;

(b) Publishing, republishing, reproducing and/or distributing anywhere, either directly or indirectly, the "Deadly Dozen" Poster, which is Trial Exhibit 1, or its equivalent, with specific intent to threaten Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients, or attorneys;

(c) Publishing, republishing, reproducing and/or distributing anywhere, either directly or indirectly, the Poster of Dr. Robert Crist, which is Trial Exhibit 5, or its equivalent, with specific intent to threaten Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients or attorneys;

(d) Providing additional material concerning Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers,

agents, servants, employees, patients, or attorneys, with a specific intent to threaten, to the Nuremberg Files or any mirror web site[2] that may be created. In addition, defendants are enjoined from publishing, republishing, reproducing and/or distributing in print or electronic form the personally identifying information about plaintiffs contained in Trial Exhibits 7 and 9 (the Nuremberg Files) with a specific intent to threaten.

2. Defendants and their agents and all individuals in active concert or participation with any of them who receive actual notice of this Order and Permanent Injunction or the attached "Notice" shall promptly submit to the custody of the Court all materials in their possession, custody or control that are not in compliance with the provisions of this Permanent Injunction, except that counsel for the defendants may retain one copy of any such materials that were included in the Record of this Court.

3. Willful violation of this Order and Permanent Injunction or any other of this Court's orders may subject any person who commits such an act to criminal and/or civil prosecution for contempt of this Court. Any violation of this Order and Permanent Injunction will result in immediate issuance of an order to show cause for service on the violator, who after appropriate hearings and findings, will be dealt with within the sanctions provided by law.

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[2] A "mirror web site" within the meaning of this Order means a web site created by an independent party who takes the content from a web site and reproduces it on his or her own computer ("the web server") and locates it at a different Internet address.

4. Defendants, and their agents and all persons in active concert or participation with any of them, are hereby ENJOINED and RESTRAINED from disposing of, secreting, pledging, encumbering, conveying, transferring, damaging, mortgaging, or otherwise disposing or removing from its customary location or in any other way making unavailable to the processes of the court, any of their real property or personal property, including, but not limited to, cash, bank accounts, retirement plans, bonds, and other securities, liquid assets and personal property regardless of whether the property is held jointly with another person or individually by the defendant.

5. This Court shall retain jurisdiction of this action for all purposes, including without limitation, all proceedings involving the interpretation, enforcement or amendment of this Order and Permanent Injunction.

Not Reported in F.Supp.2d, 1999 WL 65450 (D.Or.)

United States District Court, D. Oregon.
PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; et al., Plaintiffs,
v.
AMERICAN COALITION OF LIFE ACTIVISTS; et al., Defendants.
No. CIV. 95-1671-JO.

Feb. 25, 1999.

ORDER AND PERMANENT INJUNCTION

JONES, District J.

Plaintiffs, Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc. and Portland Feminist Women's Health Center, doing business as All Women's Health Services (collectively "plaintiffs"), commenced this action seeking a permanent injunction, damages and other relief. The trial before the jury having been concluded, and the jury having found that defendants did issue true threats against plaintiffs, and this Court having found that plaintiffs are without an adequate remedy at law, the Court makes the following findings:

1. The "Deadly Dozen" Poster (Trial Exhibit 1) is a true threat to bodily harm, assault or kill one or more of the plaintiffs.

2. The Poster of Dr. Robert Crist (Trial Exhibit 5) is a true threat to bodily harm, assault or kill one or more of the plaintiffs.

3. The "Nuremberg Files" (Trial Exhibits 7, 9) are a true threat to bodily harm, assault or kill one or more of the plaintiffs.

4. As a result of the defendants' issuance of these threats, plaintiffs have undertaken a variety of security measures in order to ensure their safety.

5. Based upon the evidence admitted at trial, the Court finds that plaintiffs remain threatened by the defendants' threats, and thus have no adequate remedy at law.

I conclude from my independent review of the evidence produced at trial that plaintiffs have proven by clear and convincing evidence that each defendant, acting independently and as a co-conspirator, prepared, published and disseminated the "Deadly Dozen" Poster, the Poster of Dr. Robert Crist and the "Nuremberg Files" with specific intent and malice in a blatant and illegal communication of true threats to kill, assault or do bodily harm to each of the plaintiffs and with the specific intent to interfere with or intimidate the plaintiffs from engaging in legal medical practices and procedures.[1]

I totally reject the defendants' attempts to justify their actions as an expression of opinion or as a legitimate and lawful exercise of free speech in order to dissuade the plaintiffs from engaging in providing abortion services.

The law requires a higher level of scrutiny and proof for an injunction involving speech than for an award of damages for violation of a statute. *See Madsen v. Women's*

[1] The term "threaten" used herein incorporates this definition.

Health Center, 512 U.S. 753 (1994). I find the actions of the defendants in preparing, publishing and disseminating these true threats objectively and subjectively[2] were not protected speech under the First Amendment. Therefore, the Court issues the following permanent injunction against each defendant, their agents and those in active concert or participation with them, and specifically against Paul DeParrie, an employee and agent of defendant Advocates for Life Ministries, who conspired with Neal Horsley of Carrollton, Georgia, to provide the specific information for the Nuremberg Files and who thereafter obstructed justice by destroying or assisting in concealing the materials he provided to Horsley to convert into true threats on his web site.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

PERMANENT INJUNCTION

1. Under the equitable powers of this Court and the Court's authority granted under the Freedom of Access to Clinics Entrances Act ("FACE"), 18 U.S.C. § 248, defendants AMERICAN COALITION OF LIFE ACTIVISTS, ADVOCATES FOR LIFE MINISTRIES, MICHAEL BRAY, ANDREW BURNETT, DAVID CRANE, MICHAEL DODDS,

[2] For purposes of this Order and Preliminary Injunction, I consider a person to make a "true threat" when the person makes a statement that, in context, a reasonable listener would interpret as communicating a serious expression of an intent to inflict or cause serious harm on or to the listener (objective); and the speaker intended that the statement be taken as a threat that would serve to place the listener in fear for his or her personal safety, regardless of whether the speaker actually intended to carry out the threat (subjective).

TIMOTHY PAUL DRESTE, JOSEPH L. FOREMAN, CHARLES ROY MCMILLAN, BRUCE EVAN MURCH, CATHERINE RAMEY, DAWN MARIE STOVER, DONALD TRESHMAN and CHARLES WYSONG (collectively "defendants"), and their agents and all persons in active concert or participation with any of them who receive actual notice of this Order and Permanent Injunction or the "Notice" attached as Exhibit A to this Order, are hereby immediately and permanently ENJOINED and RESTRAINED from committing any of the following acts or aiding, abetting, directing or facilitating others to commit or conspiring with any others to commit the following acts:

(a) Threatening, with the specific intent to do so, Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients, or attorneys, in violation of the Freedom of Access to Clinics Entrances Act ("FACE"), 18 U.S.C. § 248;

(b) Publishing, republishing, reproducing and/or distributing anywhere, either directly or indirectly, the "Deadly Dozen" Poster, which is Trial Exhibit 1, or its equivalent, with specific intent to threaten Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients, or attorneys;

(c) Publishing, republishing, reproducing and/or distributing anywhere, either directly or indirectly, the Poster of Dr. Robert Crist, which is Trial Exhibit 5, or its equivalent, with specific intent to threaten Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients or attorneys;

(d) Providing additional material concerning Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's prosecution for contempt of this Court. Any violation of this Order and Permanent Injunction will result in immediate issuance of an order to show cause for service on the violator, who after appropriate hearings and findings, will be dealt with within the sanctions provided by law.

4. Defendants, and their agents and all persons in active concert or participation with any of them, are hereby ENJOINED and RESTRAINED from disposing of, secreting, pledging, encumbering, conveying, transferring, damaging, mortgaging, or otherwise disposing or removing from its customary location or in any other way making unavailable to the processes of the court, any of their real property or personal property, including, but not limited to, cash, bank accounts, retirement plans, bonds, and other securities, liquid assets and personal property regardless of whether the property is held jointly with another person or individually by the defendant.

5. This Court shall retain jurisdiction of this action for all purposes, including without limitation, all proceedings involving the interpretation, enforcement or amendment of this Order and Permanent Injunction.

EXHIBIT A NOTICE OF ORDER OF PERMANENT INJUNCTION

The United States District Court for the District of Oregon in the above-captioned case has ordered that Defendants AMERICAN COALITION OF LIFE ACTIVISTS, ADVOCATES FOR LIFE MINISTRIES, MICHAEL BRAY, ANDREW BURNETT, DAVID CRANE, MICHAEL DODDS, TIMOTHY PAUL DRESTE, JOSEPH L. FOREMAN, CHARLES ROY MCMILLAN, BRUCE EVAN MURCH, CATHERINE RAMEY, DAWN MARIE STOVER, DONALD TRESHMAN and CHARLES WYSONG (collectively "defendants"), and their agents and all persons in active concert or participation with any of them who receive actual notice of the Order and Permanent Injunction or this Notice are hereby immediately and permanently ENJOINED and RESTRAINED from committing any of the following acts or aiding, abetting, directing or facilitating others to commit or conspiring with any others to commit the following acts:

(a) Threatening, with the specific intent to do so, Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients, or attorneys, in violation of the Freedom of Access to Clinics Entrances Act ("FACE"), 18 U.S.C. § 248;

(b) Publishing, republishing, reproducing and/or distributing anywhere, either directly or indirectly, the "Deadly Dozen" Poster, which is Trial Exhibit 1, or its equivalent, with specific intent to threaten Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients, or attorneys;

(c) Publishing, republishing, reproducing and/or distributing anywhere, either directly or indirectly, the Poster of Dr. Robert Crist, which is Trial Exhibit 5, or its equivalent, with specific intent to threaten Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients or attorneys;

(d) providing additional material concerning Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients, or attorneys, with a specific intent to threaten, to the Nuremberg

Files or any mirror web site[3] that may be created. In addition, defendants are enjoined from publishing, republishing, reproducing and/or distributing in print or electronic form the personally identifying information about plaintiffs contained in Trial Exhibits 7 and 9 (the Nuremberg Files) with a specific intent to threaten.

YOU ARE HEREBY DIRECTED TO CONFORM YOUR CONDUCT TO THE REQUIREMENTS OF THIS ORDER. IF YOU DO NOT, YOU MAY BE ORDERED TO SHOW CAUSE WHY YOU SHOULD NOT BE IMMEDIATELY ARRESTED. YOU MAY ALSO HAVE TO PAY A CIVIL CONTEMPT FINE OF UP TO $1,000.00 PER DAY UNTIL YOU COMPLY WITH THIS ORDER OR BE SUBJECT TO OTHER SANCTIONS AS PROVIDED BY LAW.

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[3] A "mirror web site" within the meaning of this Order means a web site created by an independent party who takes the content from a web site and reproduces it on his or her own computer ("the web server") and locates it at a different Internet address.

23 F.Supp.2d 1182

United States District Court, D. Oregon.
PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; et al., Plaintiffs,
v.
AMERICAN COALITION OF LIFE ACTIVISTS; et al., Defendants.
Civil No. 95-1671-JO

Oct. 14, 1998.

Carol J. Bernick, Davis Wright Tremaine, Portland, OR, Stephen S. Walters, Stoel Rives, Portland, OR, Maria T. Vullo, Paul Weiss Rifkind Wharton & Garrison, New York City, Roger Evans, Planned Parenthood Federation of America, Inc., New York City, for Plaintiffs.

William D. Bailey, Bailey & Wolfe, Portland, OR, David T. Daulton, Berean Law Group, Norfolk, VA, Kevin L. Gibbs, Olmstead Gibbs & Harper, Seattle, WA, Mark Belz, Belz & Jones, St. Louis, MO, Norman L. Lindstedt, Lindstedt & Buono, Portland, OR, Michael P. Tierney, John M. McSherry, Legal Center for the Defense of Life, New York City, Chris Ferrara, American Catholic Lawyers Association, Fairfield, NJ, for Defendants.

Michael H. Simon, Andrew J. Bowman, Chin See Ming, Perkins Coie, Portland, OR, for amicus curiae American Civil Liberties Union Foundation of Oregon.

OPINION AND ORDER

ROBERT E. JONES, District Judge.

Plaintiffs Planned Parenthood of the Columbia/ Willamette, Inc., Portland Feminist Women's Health Center, and five individual physicians[1] who provide abortions as part of their medical practices (together, "plaintiffs") brought this action against the American Coalition of Life Activists, Advocates for Life Ministries, and fourteen individual anti-abortion activists[2] (together, "defendants"), seeking damages and injunctive relief for defendants' alleged violation of the Freedom of Access to Clinic Entrances Act of 1994 ("FACE"), 18 U.S.C. § 248, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962, and the Oregon Racketeer Influenced and Corrupt Organizations Act ("ORICO"), O.R.S. 166.720.[3]

In September 1996, I made numerous rulings in this action on defendants' Rule 12(b) motions to dismiss. In essence, with the exception of the RICO and ORICO claims against defendant Bray, I permitted plaintiffs to proceed on all their claims, subject to my renewed scrutiny on appropriate motion for summary judgment. *See Planned Parenthood of Columbia/Willamette, Inc. v. American*

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[1] The individual plaintiffs are Robert Crist, Warren Hern, Elizabeth Newhall, James Newhall, and Karen Sweigert.

[2] The individual defendants are Michael Bray, Andrew Burnett, David Crane, Timothy Dreste, Michael Dodds, Joseph Foreman, Charles McMillan, Stephen Mears, Monica Miller, Bruce Murch, Catherine Ramey, Dawn Stover, Donald Treshman, and Charles Wysong.

[3] Plaintiffs have withdrawn their state law claims for intentional infliction of emotional distress.

Coalition of Life Activists, 945 F.Supp. 1355, 1378-79 (D.Or.1996) ("*Planned Parenthood I*"). Since then, the parties have been engaged in and have completed extensive discovery.

The case is now before me on the defendants' motions for summary judgment (203, 206, 211). In addition to the parties' excellent and thorough submissions and arguments, the ACLU Foundation of Oregon, Inc., as *amicus curiae,* filed an informative and helpful brief and participated at oral argument. I have considered the record and the arguments of counsel, and conclude that defendants' motions must be denied, with the exceptions noted below. I also agree with plaintiffs that, based upon the factual record now before the court, defendant Bray should be reinstated as a defendant to plaintiffs' federal and state RICO claims.[4]

STANDARD

Summary judgment should be granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). If the moving party shows that there are no genuine issues of material fact, the non-moving party must go beyond the pleadings and designate facts showing an issue for trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A scintilla of evidence, or evidence that is merely colorable or not significantly probative, does not present a genuine issue of material

[4] As noted below, I have found defendant Bray in contempt and ordered his default based on his failure to comply with discovery orders.

fact. *United Steelworkers of America v. Phelps Dodge,* 865 F.2d 1539, 1542 (9th Cir.1989).

The substantive law governing a claim determines whether a fact is material. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *see also T.W. Elec. Service v. Pacific Elec. Contractors,* 809 F.2d 626, 630 (9th Cir.1987). Reasonable doubts as to the existence of a material factual issue are resolved against the moving party. *T.W. Elec. Service,* 809 F.2d at 631. Inferences drawn from facts are viewed in the light most favorable to the non-moving party. *Id.* at 630-31.

FACTUAL BACKGROUND

Plaintiffs brought this action for injunctive relief and damages to redress what they characterize as the "campaign of terror and intimidation" the defendants allegedly have waged against them through their organization, the American Coalition of Life Activists ("ACLA"). Specifically, plaintiffs claim that defendants' statements in certain posters and other documents, when viewed in the context of violence against abortion providers, constitute "true threats" for which they may be held liable. Defendants, in turn, maintain that the challenged statements constitute protected speech under the First Amendment for which they may not be held liable.

A. *THE PARTIES*

1. *Plaintiffs.*

The individual plaintiffs are physicians who provide abortions as part of their medical practices. The two clinics, Planned Parenthood of the Columbia/Willamette

("Planned Parenthood") and Portland Feminist Women's Health Center ("Portland Feminist") offer abortion services as well as other reproductive health care services. Planned Parenthood, a not-for-profit corporation organized under the laws of the state of Oregon, operates six clinics in Oregon. Portland Feminist, also a not-for-profit Oregon corporation, operates clinics in Portland and in Eugene, Oregon, under the name All Women's Health Services.

With the exception of plaintiff Sweigert and the two clinic plaintiffs, each of the individual plaintiffs has been the specific target of one or more of the statements alleged to constitute "true threats."

2. *Defendants.*

The ACLA, one of the two defendant organizations, is an unincorporated organization based in Portland, with members and activities throughout the United States. The record shows that the ACLA formed in 1994, following a doctrinal split in the anti-abortion (or pro-life) movement over the issue of violence. *See, e.g.,* Plaintiffs' Concise Statement, Exhibit 53, p. 1.

Defendant Advocates for Life Ministries ("ALM") also is an unincorporated association that operates principally in Portland. ALM publishes *Life Advocate,* a magazine distributed nationally and internationally. The record shows that *Life Advocate* has published articles that endorse interference with and obstruction of abortion services through, among other things, use of force. *See, e.g.,* Plaintiffs' Concise Statement, Exhibit 61.

With the exception of defendant Bray, the individual defendants are present and former directors of the ACLA

and have been actively involved in its activities, among other things. In addition to his role as a director of the ACLA, defendant Burnett is one of the founders of the ACLA, the executive director of ALM, and the publisher of *Life Advocate* magazine. Burnett also published Bray's treatise, *A Time to Kill,* and has marketed and distributed the treatise nationwide. Plaintiffs describe the treatise as an "attempt[] to justify revolution and vigilante violence" against abortion providers. Amended Complaint, ¶ 19.

Defendant Bray, who previously spent 46 months in federal prison for conspiring to bomb 10 clinics, authored *A Time to Kill.* Although I previously dismissed the RICO and ORICO claims against Bray,[5] based upon the evidence of record, I am now satisfied that there is at least a genuine issue of material fact as to whether Bray participated sufficiently in the "operation and management" of the ACLA as to be potentially liable on plaintiffs' racketeering claims and that those claims should be reinstated against him. Moreover, based on Bray's refusal to comply with discovery orders, plaintiffs moved for an order of contempt against him, which I granted in part during oral argument on September 29, 1998. At that time, I also ruled that if defendant Bray did not submit to a further deposition by October 13, 1998, I would hold him in contempt. I now so hold, and further order him in default and his defenses stricken. In the event, however, that the remaining defendants prevail on the issue of whether their statements

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[5] The court granted defendants' motion to dismiss Bray as a defendant in the RICO and ORICO claims on the ground that the complaint failed to allege sufficient participation on Bray's part in the ACLA enterprise. *See Planned Parenthood I,* 945 F.Supp. at 1385.

constitute true threats (see discussion below), then the order of default will be set aside.

B. *THE THREATS*

Plaintiffs have identified certain specific documents they contend contain actionable "true threats" when viewed in context. These specific documents are: (1) the "Deadly Dozen" poster and its various republications; (2) the poster of plaintiff Crist; (3) the bumper sticker "Execute Murderers/Abortionists" and its various republications; and (4) the "Nuremberg Files," which also include a file specific to plaintiff Hern that bears the heading "Third Trimester Butchers." These documents are attached to Plaintiffs' Concise Statement as Exhibits 45, 48, 49, 67 (Deadly Dozen); Exhibit 55 (Crist poster); Exhibits 23-31 (bumper sticker); and Exhibits 70-73 (Nuremberg Files[6]).

Plaintiffs also identify as threats certain other ACLA posters distributed at the ACLA's St. Louis event in August 1995. These additional posters, attached as Exhibits 56-60 to Plaintiffs' Concise Statement, are discussed below. None of these additional posters mentions any of the plaintiffs in this case.

Significantly for purposes of the present motions, no statement contained in the text of the Deadly Dozen poster, the Crist poster, or the Nuremberg Files is expressly threatening, in the sense that there are no "quotable quotes" calling for violence against the targeted

[6] Additional versions of the Nuremberg Files are attached as Exhibit C to the Affidavit of Maria Vullo and as Exhibit G to the Affidavit of Elizabeth Newhall.

providers. Instead, the documents contain the following statements:

1. *Deadly Dozen Poster.*

Defendant Crane presented the Deadly Dozen poster at a press conference held during an ACLA meeting on January 21, 1995. Several of the individual defendants, including defendant Bray, were present.

The poster contains a heading in large, bold print that states: "GUILTY of Crimes Against Humanity." The document then makes a statement about prosecution of abortion as a "war crime" during the Nuremberg trials in 1945-46. The poster next sets out – under the heading "THE DEADLY DOZEN" – the names, addresses, and telephone numbers of 12 people, including both Newhall plaintiffs and plaintiff Hern. The poster then offers a "$5,000 reward" for "information leading to arrest, conviction and revocation of license to practice medicine," states in large letters "ABORTIONIST," and gives the name and address of the ACLA. Thus, the statement that stands out because it is emphasized either by the size and/or boldness of print, reads: "GUILTY OF CRIMES AGAINST HUMANITY * * * THE DEADLY DOZEN * * * $5,000 REWARD * * * ABORTIONIST." *See* Exhibit 45 to Plaintiffs' Concise Statement.

The evidence shows that the FBI informed the Newhall plaintiffs and plaintiff Hern about the poster on the evening of January 21, 1995, and almost immediately offered them around-the-clock federal marshal protection. The FBI also advised these plaintiffs to obtain and wear bulletproof vests and to take other precautions, which they did. Plaintiff Sweigert, who sometimes works at the same

Portland clinic where the Newhalls work, also purchased a bulletproof vest within days after the ACLA released the Deadly Dozen poster. In addition, because of their working relationships with the Newhalls and Sweigert, Portland Feminist and Planned Parenthood undertook additional security measures following release of the Deadly Dozen poster.

2. *The Crist Poster.*

The ACLA released the Crist poster and five other posters during a conference held on August 2-5, 1995. Three of the posters specifically identified doctors; three others identified specific reproductive health care clinics. Of these, one (Reproductive Health Services) is a Planned Parenthood affiliate where Crist worked. The evidence shows that several of the defendants were involved in planning the posters.

The poster targeting plaintiff Crist bears the initial heading "GUILTY" in very large print, followed by "OF CRIMES AGAINST HUMANITY" in somewhat smaller print. The poster then sets out the same statement about the Nuremberg trials that appears on the Deadly Dozen poster, followed by the statement "Abortionist Robert Crist." Below that statement is a photograph of Crist, and a listing of his home and work addresses. Directly below the photograph is language, in tiny print, describing Crist as a "notorious Kansas City abortionist [who] travels to St. Louis weekly to kill babies at Reproductive Health Services * * * . He also sometimes kills women." The poster next recites information about women allegedly injured by Crist, followed by a request (again, in tiny print) to

> Please write, leaflet or picket his neighborhood to expose his blood guilt. Ask Crist to turn from killing and injuring women and children, to helping and healing those in need.

In large print directly below the quoted language are the words "$500 REWARD" followed by (in tiny print) "to any ACLA organization that successfully persuades Crist to turn from his child killing through activities within ACLA guidelines." Finally, like the Deadly Dozen poster, the word "ABORTIONIST" appears in very large print, followed by the ACLA's name and address. Thus, the emphasized portions of the poster read "GUILTY OF CRIMES AGAINST HUMANITY * * * Abortionist Robert Crist * * * $500 REWARD * * * ABORTIONIST." *See* Exhibit 55 to Plaintiffs' Concise Statement.

Following release of the poster, Crist received additional protection from both state and federal law enforcement authorities.[7]

3. *The Bumper Sticker.*

According to plaintiffs' evidence, Bray created the bumper sticker, which has been distributed at anti-abortion events and through the mail since about 1992. The bumper sticker, which appears in a variety of exhibits, states, in very large black letters, "EXECUTE." To the right of "execute," in red letters, is the word "Murderers"

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[7] In August 1992, Crist was accosted by a group led by Treshman at the airport in Houston, Texas. From then until May 1993, Crist did not practice any form of medicine. Eight days after he returned to his medical practice, shots were fired into his children's playroom. No arrests were ever made in the shooting. Affidavit of Robert Crist, ¶ 11.

and the word "Abortionists" directly below it. The advertisements for the bumper sticker state that the background color is yellow. *See, e.g.,* Exhibits 23 and 24 to Plaintiffs' Concise Statement.

4. *The Nuremberg Files.*

During an ACLA event in January 1996, Paul deParrie, who is not a defendant, displayed a box that defendant Crane labeled the "Nuremberg Files." In the box were files that contained personal identifying information on doctors.[8] At the same event, defendants held a "White Rose Banquet," at which they honored individuals who were incarcerated for committing anti-abortion violence.

> The Nuremberg Files appeared on the Internet in January 1997. At the top of the first page on the Internet was the statement "VISUALIZE Abortionists on Trial," followed by:
>
> THE NUREMBERG FILES
>
> The American Coalition of Life Activists (ACLA) is cooperating in collecting dossiers on abortionists in anticipation that one day we may be able to hold them on trial for crimes against humanity. *Click the Hot Link at the bottom of this page to vote to make this site a "Starting Point Hot Site."* Your vote can bring tens of thousands of people face to face with the fact that everybody faces a payday someday, a day when what is sown is reaped.

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[8] There is evidence that one of the "Nuremberg Files" targeted plaintiff James Newhall. Affidavit of Elizabeth Newhall, Exhibit G. Defendants have not produced that file to plaintiffs. *See* Plaintiffs' Memorandum in Opposition, p. 32.

Why This Must Be Done

> One of the great tragedies of the Nuremberg trials after WWII was that complete information and documented evidence had not been collected so many war criminals went free or were only found guilty of minor crimes.
>
> We do not want the same thing to happen when the day comes to charge abortionists with their crimes. We anticipate the day when these people will be charged in PERFECTLY LEGAL COURTS once the tide of the nation's opinion turns against child-killing (as it surely will).

Plaintiffs' Concise Statement, Exhibit 70, p. 1. The names of approximately 200 people labeled "ABORTIONISTS: the shooters," as well as more than 200 others[9] are listed in the Nuremberg Files.

As described above, the Nuremberg Files contain personal identifying information (including a photograph) of plaintiff Hern under the heading "THIRD TRIMESTER BUTCHERS." Plaintiffs' Concise Statement, Exhibit 71, p. 1. The document states that the reader "might want to share your point of view with this 'doctor,'" and further states:

> If you can find any other information (web pages, etc.) we'd appreciate you sending it to us.

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[9] The other names appear under the label "CLINIC WORKERS: their weapons bearers," "JUDGES: their shysters," "POLITICIANS: their mouthpieces," "LAW ENFORCEMENT: their bloodhounds," or "MISCELLANEOUS BLOOD FLUNKIES." Plaintiffs' Concise Statement, Exhibit 70, pp. 5-8.

> Also, Please find out this information on the butchers in your state who do partial birth and third trimester abortions. There certainly must be a special place in hell for such unrepentant slaughterers of God's children.

Id. In three areas, the page bears drawings of what appear to be lines of dripping blood.

Also as mentioned above, there is evidence that in 1995, defendants Burnett and Ramey had displayed a Nuremberg File containing a poster and color photographs of plaintiff James Newhall and of his home. There is no evidence that personal information concerning the other plaintiff doctors appeared in the files or on the Internet, although several plaintiffs' names and the names of certain employees of the plaintiff clinics are listed. *See* Plaintiffs' Concise Statement, Exhibit 70, pp. 4-8; *see also* footnote 9.

C. *THE CONTEXT OF VIOLENCE*

Plaintiffs' submissions describe, in great detail, a period of escalating violence against abortion providers reaching back at least to the murder of Dr. David Gunn in March 1993. Defendants do not seriously challenge the factual accuracy of plaintiffs' description of these events, but focus instead on the relevancy of the contextual events to the legal issues at hand. Accordingly, I will not summarize the facts giving rise to the "context of violence" here, but note only that there is substantial evidence of record from which a rational trier of fact could conclude that the defendants in this case were aware of and promoted the atmosphere of violence surrounding the anti-abortion movement.

DISCUSSION

A. *EXISTENCE OF "TRUE THREAT"*

The primary issue raised by defendants' motions is whether the statements plaintiffs attribute to them are protected speech subject to First Amendment protection. If the statements are protected speech then, as a matter of law, each of plaintiffs' claims fails because each depends upon proof that the defendants made threats that are not entitled to constitutional protection.

To sustain their claims under FACE, plaintiffs must prove that the defendants violated or conspired to violate FACE, which, as relevant to this case, proscribes "threats of force" that intentionally "intimidate" a person from providing reproductive health services. 18 U.S.C. § 248(a)(1). "Intimidate" is defined in FACE to mean "to place a person in reasonable apprehension of bodily harm to him – or herself or to another." 18 U.S.C. § 248(e)(3).

With respect to their RICO and ORICO claims, plaintiffs assert, as the requisite predicate acts, that defendants[10] engaged in extortion in violation of the Hobbs Act, 18 U.S.C. § 1951, and the Oregon coercion statute, O.R.S. 163.275, both of which (for purposes of plaintiffs' claims in this case) require proof of threats of force.

Thus, the viability of each of plaintiffs' claims depends on whether the defendants' statements constitute protected speech or unprotected "true threats." This is because unlike political hyperbole or other protected speech, "true threats" are not protected under the First Amendment. *Watts v.*

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[10] That is, all of the defendants except the ACLA, which plaintiffs allege to be the "enterprise."

United States, 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969). Although the Ninth Circuit has articulated an objective, speaker-based test for use in determining whether an alleged threat is a "true threat" for purposes of First Amendment analysis, *see, e.g., Lovell v. Poway Unified School District,* 90 F.3d 367, 372 (9th Cir.1996), the applicability of that objective test in the circumstances of this case has been challenged by the defendants and questioned by *amicus curiae.* I discuss the arguments in turn.

1. *Defendants' Arguments.*

Defendants[11] premise their arguments on the proposition that the statements at issue in this case contain no apparent threats and are facially non-threatening. Based on that premise, defendants assert that the court should not resort to "contextual analysis" to determine if a threat exists, *i.e.,* should not consider the factual circumstances, including the surrounding events and the reaction of the listeners, but should instead dismiss plaintiffs' claims on a facial challenge. In support of this argument, defendants rely on a Second Circuit decision, *United States v. Kelner,* 534 F.2d 1020, 1027 (2d Cir.1976). In *Kelner,* the court stated that

> So long as the threat *on its face and in the circumstances* in which it is made is so *unequivocal, unconditional, immediate, and specific* as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution, the

[11] Because the defendants have incorporated each other's submissions, their arguments will not be addressed separately.

> statute may properly be applied. (Emphasis added.)

Defendants interpret *Kelner* to require that a threat be "unequivocal, unconditional, immediate, and specific" both on its face *and* in context before it can constitute a true threat. Moreover, defendants contend that the *Kelner* test was adopted by the Ninth Circuit in *Lovell By and Through Lovell v. Poway Unified School District,* based upon the *Lovell* court's citation to *Kelner* as in "*accord*" with Ninth Circuit precedent. *See Lovell,* 90 F.3d at 372.

Defendants also rely heavily on an Oregon Court of Appeals case, *Hanzo v. deParrie,* 152 Or.App. 525, 953 P.2d 1130 (1998), which involved a challenge to a civil stalking order issued under O.R.S. 30.866, for the proposition that "contextual overlay" may not be considered in assessing facially non-threatening speech. *See Hanzo,* 152 Or.App. at 540, 953 P.2d 1130. Defendants also rely on *Hanzo* as support for their position that expression may only constitute a threat if it is "so unambiguous, unequivocal, and specific to the addressee" that it convincingly expresses the intention that the threat will be carried out. Memorandum of Law on Behalf of Defendants Miller and Threshman, p. 6.

2. *Plaintiffs' Arguments.*

Plaintiffs respond that the Ninth Circuit has consistently applied an objective, speaker-based test in determining whether a threat is a "true threat." *See, e.g., Lovell,* in which the Ninth Circuit explained:

> We have set forth an objective test for determining whether a threat is a "true threat" and, thus, falls outside the protection of the First Amendment:

> "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." *United States v. Orozco-Santillan,* 903 F.2d 1262 (9th Cir.1990). Furthermore, "[a]lleged threats should be considered in light of their entire factual context, including the surrounding events and the reaction of the listeners." *Id.* (citing *United States v. Gilbert,* 884 F.2d 454, 457 (9th Cir.1989), * * * and *United States v. Mitchell,* 812 F.2d 1250, 1255 (9th Cir.1987)) * * * .[12]

90 F.3d at 372.

Plaintiffs contend that under Ninth Circuit precedent, statements must be evaluated within their full context to determine whether they are true threats, and there is no requirement that the threat be apparent on its face before context may be considered. *See U.S. v. Orozco-Santillan,* 903 F.2d 1262, 1265 (9th Cir.1990) (" 'The fact that a threat is subtle does not make it less of a threat' ") (quoting *U.S. v. Gilbert,* 884 F.2d 454, 457 (9th Cir.1989)); *see also U.S. v. Fulmer,* 108 F.3d 1486, 1492 (1st Cir.1997) ("The use of ambiguous language does not preclude a statement from being a threat").[13]

Plaintiffs also argue that the Second Circuit has not adhered to the strict approach defendants would have the court read into *Kelner.* In *U.S. v. Malik,* 16 F.3d 45 (2d

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[12] The citation to *Kelner* on which defendants rely immediately follows the citation to *Mitchell* in the quoted statement from *Lovell.*

[13] The *Fulmer* court affirmed the trial court's jury instruction that "the fact that a threat is subtle or lacks explicitly threatening language does not make it less of a threat." 108 F.3d at 1494.

Cir.1994), the Second Circuit clarified that ambiguous threats, *standing alone,* cannot establish a predicate for criminal liability. The court recognized, however, that if substantial additional contextual evidence is presented – including evidence of the recipients' states of mind and their reactions – "the existence *vel non* of a 'true threat' is a question generally best left to a jury." *Malik,* 16 F.3d at 50-51. The court explained:

> "Written words or phases take their character as threatening or harmless from the context in which they are used, measured by the common experience of the society in which they are published." Thus, rigid adherence to the literal meaning of a communication without regard to its reasonable connotations derived from its ambience would render the statute powerless against the ingenuity of threateners who can instill in the victim's mind as clear an apprehension of impending injury by an implied menace as by a literal threat. Surely, an equivocal letter with equal chances of being interpreted innocuously or harmfully should not, in and of itself, convince a jury * * * that it is a threat. *But once sufficient extrinsic evidence, capable of showing beyond a reasonable doubt that an ordinary and reasonable recipient familiar with the context of the letter would interpret it as a threat, has been adduced the trial court should submit the case to the jury.*

Malik, 16 F.3d at 50 (citation omitted; emphasis added).

Finally, plaintiffs maintain that whether a statement is a true threat is a question of fact for the trier of fact. I resolved this issue in favor of plaintiffs in *Planned Parenthood I,* and adhere to my earlier ruling on this point.

See Planned Parenthood I, 945 F.Supp. at 1372 n. 14 ("contrary to Defendants' assertions, the jury determines whether a threat constitutes a 'true threat'"); *see also Melugin v. Hames,* 38 F.3d 1478, 1485 (9th Cir.1994) (whether plaintiff has shown a "true threat" is a question of fact for the jury, not a question of law for the court).

3. *Position of the Amicus Curiae.*

The ACLU acknowledges that the Ninth Circuit has adopted an objective, speaker-based test to determine whether an alleged threat is a true threat for purposes of First Amendment analysis. Nevertheless, the ACLU urges the court to adopt a different test in this case, one with both an objective, listener-based component and a subjective, speaker-based component. The subjective speaker-based component is necessary, according to the ACLU, to insure that there is proof that the speaker actually intended to threaten rather than merely to communicate an idea using protected speech. Specifically, the ACLU proposes that plaintiffs be required to show the following:

> 1. Considering the alleged threat in light of its relevant factual context, would a reasonable listener (or recipient of the communication) interpret the statement as communicating a serious expression of an intent to inflict or cause serious harm to the listener, i.e., would a reasonable person perceive the statement as a threat?
>
> 2. Did the speaker intend that the communication be taken as a threat to inflict or cause serious harm to the listener, thereby intending to place the listener in fear for his or her safety, regardless of whether the speaker actually intended to carry out the threat?

Memorandum of ACLU Foundation of Oregon, p. 27.

At oral argument, the ACLU justified this substantial departure from Ninth Circuit precedent by arguing that the present case is sufficiently distinguishable as to qualify as one of first impression in this circuit. In saying this, the ACLU appears to agree with defendants the statements at issue are facially innocuous, *i.e.*, contain no express threats or even ambiguously threatening language.

4. *Analysis.*

In view of the parties' arguments, the threshold issue that must be resolved is whether the Ninth Circuit has adopted by reference the narrow *Kelner* requirement that a threat be "so unequivocal, unconditional, immediate and specific * * * as to convey a gravity of purpose and imminent prospect of execution." *Kelner,* 534 F.2d at 1027. Although defendants read much into the *Lovell* court's use of the signal *accord,* as the *amicus curiae* points out, the Ninth Circuit's use of the signal *accord* is confusing at best, *see* Memorandum of ACLU Foundation of Oregon, p. 30 n. 24, and I am not persuaded that by that simple reference, the Ninth Circuit intended thereafter to graft the *Kelner* test – however it is interpreted – onto existing Ninth Circuit law. Instead, I construe the citation to *Kelner* as a recognition that the Second Circuit, like the Ninth Circuit, holds that whether a threat is a true threat must be determined in light of the context (or circumstances) in which it is made.

That the Ninth Circuit does not consider *Kelner* controlling is apparent even from *Lovell,* the case on which defendants rely. In *Lovell,* the Ninth Circuit reversed a

trial court judgment in favor of the plaintiff, a high school student who was suspended for threatening her school guidance counselor. The parties gave differing versions of the remark that was the basis of the suit. The student claimed that she said "I'm so angry, I could just shoot someone," whereas the guidance counselor claims the student said "If you don't give me this schedule change, I'm going to shoot you!" *Lovell,* 90 F.3d at 369. The trial court evidently accepted the student's version, at least in part. *See Lovell,* 90 F.3d at 369 n. 1. After making the statement, the student apologized to the guidance counselor for her inappropriate behavior, and left the office.

The trial court found that no matter which statement the student made, it was not a "true threat." In reversing, the Ninth Circuit noted that the trial court "lost sight" of the fact that the *ultimate inquiry is whether a reasonable person in [the student's] position would foresee that [the guidance counselor] would interpret her statement as a serious expression of intent to harm or assault.* 90 F.3d at 372 (emphasis added). The court held that a reasonable person in the circumstances would have foreseen that the guidance counselor would interpret the statement "If you don't give me this schedule change, I'm going to shoot you" – a conditional threat – as a serious expression of intent to harm. *Lovell,* 90 F.3d at 372; *see also U.S. v. Gilbert,* 884 F.2d at 457 (fact that threat is subtle does not make it less of a threat; trial court was correct in reviewing all mailings as a whole, rather than parsing them).

I conclude that, to the extent the Second Circuit continues to adhere to *Kelner* (see the discussion at pages 20-21, *supra*), it is not Ninth Circuit law.

I turn now to the question of whether the Ninth Circuit objective speaker-based test should apply in this case, or whether I should adopt the ACLU's proposed two-part test. I have carefully evaluated the Ninth Circuit cases from which the present objective test evolved, and conclude that the existing test adequately protects the defendants' First Amendment rights in this case.

It appears that the Ninth Circuit first articulated the objective speaker-based test in *Roy v. United States,* 416 F.2d 874 (9th Cir.1969). In *Roy,* the court was called upon to construe the willfulness requirement of 18 U.S.C. § 871, which prohibited "willfully" threatening the President of the United States. The court held that "willful" was coextensive with "intentional":

> This Court therefore construes the willfulness requirement of the statute to require only that the defendant intentionally make a statement, written or oral, in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or to take the life of the President, and that the statement not be the result of a mistake, duress, or coercion. The statute does not require that the defendant actually intend to carry out the threat.

Roy, 416 F.2d at 877-78 (footnotes omitted). Thus, in *Roy,* the Ninth Circuit concluded that for purposes of section 871, "willful meant only intentional." *Gilbert II,* 884 F.2d at 458; *see Roy,* 416 F.2d at 877. Moreover, *Roy* established that the appropriate test for insuring proof of the requisite intent was an objective, speaker-based test. The test set forth in *Roy,* however, unlike the current Ninth Circuit

formulation in, for example, *Lovell,* also appears to have included an element of proof that the statement was not "the result of mistake, duress, or coercion" or even jest. *Roy,* 416 F.2d at 877-78.

In *United States v. Merrill,* 746 F.2d 458 (9th Cir.1984), the court again emphasized that the intent requirement of section 871 was to be determined by the objective test set forth in *Roy,* 746 F.2d at 462. The *Merrill* court also emphasized that "[w]hether any given form of written or oral expression constitutes a true threat for the statute's purposes is a question for the trier of fact under all of the circumstances." *Merrill,* 746 F.2d at 462.

A few years later, in *U.S. v. Gilbert,* 813 F.2d 1523 (9th Cir.1987) ("Gilbert I"), the court addressed the defendant's First Amendment challenge to a provision of the Fair Housing Act, 42 U.S.C. § 3631, a statute remarkably similar to FACE. Section 3631 prohibits, among other things, use of threats of force to "willfully" intimidate or interfere with any person on the basis of race, color, religion, sex, or national origin in the occupation of a dwelling, including the placement of adopted children in housing. *See U.S. v. Gilbert,* 813 F.2d 1523, 1526-27 (9th Cir.1987) ("*Gilbert I*"); *see also U.S. v. Gilbert,* 884 F.2d 454, 456 (9th Cir.1989) ("*Gilbert II*").

In rejecting defendant's First Amendment challenge to his indictment under the statute, the court noted that the element of intent – *i.e.,* the "willfulness requirement" – was the "determinative factor separating protected expression from unprotected criminal behavior." *Gilbert I,* 813 F.2d at 1529. The court further noted, however, that

> Whether any given form of written expression can supply the requisite intent requirement is a

> question for the trier of fact. * * * Certain types of expression which by their nature inflict injury or tend to incite an immediate breach of the peace are arguably unprotected. * * * The government bears the ultimate burden of proving that Gilbert's actions were taken with the requisite intent to place them into that category. * * * Thus it is a jury question whether actions and communications are clearly outside the ambit of first amendment protection.

Gilbert I, 813 F.2d at 1529-30 (citations omitted).

Two years later, in *Gilbert II,* the Ninth Circuit decided Gilbert's direct appeal from his conviction under section 3631. Confirming that section 3631 contains an intent requirement, the Ninth Circuit also extended the rationale of *Roy* (decided under 18 U.S.C. § 871) to section 3631, holding, in essence, that whether a threat is a "true threat" must be determined in light of the entire factual context, including consideration of surrounding events and the reaction of the listeners.

> *Gilbert II,* 884 F.2d at 457, 458. The court stated:
>
> While the mailings may not have said "we're going to hurt you, Susan Smith," they certainly said "we don't like what you're doing, and we hurt people who do things we don't like." The fact that a threat is subtle does not make it less of a threat. The district court was correct in reviewing all of the mailings as a whole, rather than parsing them as Gilbert suggests. Viewed as a whole, and using the contextual analysis we have used for other statutes, a rational trier of fact could find a threat.

Gilbert II, 884 F.2d at 457.

Significantly, the court affirmed the trial court's rejection of defendant's proposed jury instruction that stated that a threat is willfully made "'if the maker voluntarily and intelligently utters the words in an apparent determination to carry out the threat,'" finding no material difference between an instruction requiring a true threat and one requiring "'an apparent determination to carry out the threat.'" 884 F.2d at 457. The court explained:

> [In *Roy,*] [w]e concluded that willful meant only intentional. * * * This rationale – that the threat *qua* threat is harmful and prohibited – would best serve the purpose of section 3631. * * *
>
> Under the analysis suggested by *Roy,* it is clear that the district court did not abuse its discretion. The given instruction advised jurors that the threat must be a "true threat" – as opposed, for example, to political hyperbole – and that it must have been intentionally made. Whether language is or is not a true threat is a proper question for a jury.

Gilbert II, 884 F.2d at 458 (citations omitted).

The Ninth Circuit has consistently adhered to the *Roy* objective test. In *U.S. v. Orozco-Santillan,* 903 F.2d 1262 (9th Cir.1990), for example, the defendant was convicted of threatening federal law enforcement officers in violation of 18 U.S.C. § 115. In analyzing the defendant's assertion that his statements were not threats, the court noted that "alleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners." 903 F.2d at 1265 (citing *Gilbert II,* 884 F.2d at 457). The court further explained that

> Whether a particular statement may properly be considered to be a threat is governed by an objective standard – whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault. * * * A "true" threat, where a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person, is unprotected by the first amendment.

Orozco-Santillan, 903 F.2d at 1265-66. In a footnote, the court further clarified that "[t]he only intent requirement is that the defendant intentionally or knowingly communicates his threat, not that he intended or was able to carry out his threat." 903 F.2d at 1265 n. 3 (citing *Gilbert II,* 884 F.2d at 456-57; and *United States v. Davis,* 876 F.2d 71, 73 (9th Cir.1989) (applying 18 U.S.C. § 876)).

Importantly, the statute at issue in *Gilbert I* and *II,* 42 U.S.C. § 3631, and FACE, 18 U.S.C. § 248(a), are nearly identical in all respects material to this case. Section 3631(c) punishes

> [w]hoever * * * by force or *threat of force willfully* injures, *intimidates,* or interferes with, or attempts to injure, intimidate, or interfere with * * * any citizen because he is or has been, or in order to discourage such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion, sex or national origin, in [the occupation of a dwelling].

42 U.S.C. § 3631(c) (emphasis added).

Similarly, FACE punishes

> [w]hoever * * * by force or *threat of force* or by physical obstruction, *intentionally* injures, *intimidates* or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any person or any class of persons from, obtaining or providing reproductive health services * * * .

18 U.S.C. § 248(a)(1) (emphasis added).

Although section 3631 uses "willfully" and FACE uses "intentionally," under the Ninth Circuit precedent discussed above, the difference in language between the two statutes is not substantive. Thus, while the ACLU is correct that FACE contains an element of intent, that requirement is not peculiar to FACE and does not, in my view, require a departure from existing Ninth Circuit law. Both statutes punish threats and both, therefore, carry the potential to encroach on First Amendment rights. The rationale of *Roy,* which the Ninth Circuit has extended repeatedly to other "threat" statutes, applies equally here.

If there is a distinction between existing Ninth Circuit cases and this one, it is in the content of the statements constituting the alleged threats. On this, I tend to agree with the defendants and the ACLU that the statements at issue do not contain any expressly or apparently threatening language. Nevertheless, I do not agree with defendants that a threat must be apparent on its face before context may be considered. Instead, the Ninth Circuit consistently has emphasized that whether statements are "true threats" must be determined "in light of their entire factual context." *See, e.g., Lovell, supra,* 90 F.3d. at 372. I

also do not agree that the lack of expressly threatening language requires creation of a different test. In *Roy,* for example, the defendant argued that the word "get" in the statement "I am going to get him" could innocently mean only "become even with" or "gain an advantage over." The Ninth Circuit emphasized that the import of the statement as innocent or threatening must be determined from the context in which it was made. *Roy,* 416 F.2d at 876 n. 6.[14]

The ACLU's concern, as well as that of the defendants, is that liability not attach unless the threats are intentionally made, and do not constitute jests or political hyperbole, even extreme political hyperbole. The cases discussed above amply show that the Ninth Circuit shares this concern, and yet repeatedly has confirmed that an objective speaker-based test that considers all the circumstances is sufficient to permit the trier of fact to distinguish between "true threats" and speech protected by the First Amendment. *See, e.g., Gilbert II,* 884 F.2d at 457 n. 5, and *Gilbert I,* 813 F.2d at 1529 ("the statute's requirement of intent to intimidate serves to insulate the statute from unconstitutional application to protected speech"). Accordingly, I decline to depart from established Ninth Circuit law and create a test unique to this case.[15]

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[14] Moreover, despite some similarities between the facts of this case and the conduct at issue in *Hanzo v. deParrie,* 152 Or.App. 525, 953 P.2d 1130 (1998), state law analysis, while certainly instructive, does not "trump" Ninth Circuit analysis of federal law. *See Lovell,* 90 F.3d at 371 (district court implicitly and inappropriately allowed California Education Code to trump federal law). Thus, *Hanzo,* decided under state law, is not controlling.

[15] I emphasize that plaintiffs will not be permitted to present "expert" evidence on the issue of whether the statements are "true threats."

B. *THE ALLEGED THREATS*

Of the documents plaintiffs contend contain threats, I agree with the ACLU and the defendants that only three of them, the Deadly Dozen poster, the Crist poster, and the Nuremberg Files (including the Hern poster contained in the Nuremberg Files), are actionable. Plaintiffs' evidence fails to raise an issue of fact as to whether the defendants reasonably should have foreseen that the plaintiffs would interpret the bumper sticker "as a serious expression of an intention to inflict bodily harm" on any one of them. *Roy,* 416 F.2d at 877. While the bumper sticker suggests violent action and may represent the fringe of political hyperbole, the generality of language and the circumstances of its wide dissemination convince me that it is not susceptible of an interpretation that it constitutes a "true threat" of harm to anyone in particular. The defendants' involvement in the creation, sale, display, or approval of the bumper sticker, however, certainly are part of contextual facts relevant to this case.

The other posters identified by the plaintiffs as alleged threats (Exhibits 56-60), which the ACLA released in St. Louis in August 1995, do not refer to any of these plaintiffs. Plaintiffs have not argued that they should be allowed to proceed on the specified posters, and I conclude that those posters are not actionable in this case.

In summary, plaintiffs' claims of threat, as opposed to the context in which the threats were made, are limited to the Deadly Dozen poster, the Crist poster, the Nuremberg Files (including the Hern poster), and any republications of those documents.

C. *STANDING OF PLAINTIFFS SWEIGERT, PLANNED PARENTHOOD, AND PORTLAND FEMINIST*

Defendants contend that plaintiffs Sweigert, Planned Parenthood, and Portland Feminist lack "standing" to pursue claims under either FACE or RICO, because the alleged threats did not specifically mention or target them. According to defendants, Sweigert, Planned Parenthood, and Portland Feminist "are nothing more than bystanders, pointing to the alleged misfortunes of third parties as their only basis for standing." Reply Memorandum of Defendants Miller and Treshman, p. 70.

FACE permits "[a]ny person aggrieved by reason of the conduct prohibited by subsection (a)" to commence a civil action for recovery of injunctive relief, compensatory damages, and punitive damages. 18 U.S.C. § 248(c)(1)(A) and (B). Sweigert and the clinic plaintiffs have presented evidence that, because of their working relationships with the actual targets of the alleged threats, they also felt threatened and undertook security measures as a result. While defendants express skepticism toward plaintiffs' evidence, I am not persuaded that these plaintiffs lack standing *as a matter of law* to pursue their claims. As acknowledged by the plaintiffs in their reply brief, at trial *each* plaintiff will be required to prove that a reasonable person[16] in that plaintiff's position would have felt threatened by the defendants' statements in the context in which the statements were made. Moreover, to prevail on their RICO and ORICO claims, each plaintiff must prove pecuniary loss. Nevertheless, Sweigert's and the clinics'

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[16] To prove intimidation, each plaintiff must prove that he or she was placed "in *reasonable* apprehension of bodily harm to him or herself or to another." 18 U.S.C. § 248(e)(3) (emphasis added).

evidence, although thin, is sufficient to create a genuine issue of material fact on these issues for purposes of the present motions, and summary judgment must be denied.

D. *AVAILABILITY OF PUNITIVE DAMAGES*

As in their earlier motions, defendants again contend that Article I, section 8, of the Oregon Constitution prohibits any award of punitive damages in this case. Defendants assert: "The Oregon Constitution forbids punitive damages for any injury resulting even from an *abuse* of *protected expression.*" Memorandum of Law on Behalf of Defendants Miller and Treshman, p. 48 (underscoring added). That argument itself, however, suggests the proper resolution of the issue at this juncture. If the trier of fact determines that defendants have made "true threats," then defendants' statements are not "protected expression" under either the Oregon Constitution or the First Amendment. *See* the discussion of this issue in *Planned Parenthood I,* 945 F.Supp. at 1387-88. If the trial results in a decision against some or all of the defendants on the issue of "true threat," then and only then will I determine whether to submit the issue of punitive damages.

E. *REMAINING ISSUES*

Defendants make a variety of other arguments in favor of summary judgment or partial summary judgment. These other arguments either depend on a finding that the statements at issue are not "true threats" as a matter of law, or involve issues of disputed fact (including the involvement of each defendant in making or conspiring to make the alleged threats). Accordingly, to the extent that this opinion has not already addressed these arguments,

defendants' remaining arguments are rejected with respect to the present motions.

CONCLUSION

Defendants' motions for summary judgment (203, 206, and 211) are DENIED with the following exceptions: Summary judgment is granted in favor of all defendants on plaintiffs' claims arising out of the bumper sticker and the posters attached as Plaintiffs' Exhibits 56-60 to the Concise Statement of Material Fact. It is further

ORDERED that (1) defendant Bray is reinstated as a defendant to plaintiffs' RICO and ORICO claims, and (2) defendant Bray is in contempt and declared to be IN DEFAULT and his defenses stricken as a sanction for noncompliance with court orders, subject to relief from default, if appropriate, after a verdict is rendered on the issue of the existence of "true threats."

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945 F. Supp. 1355

United States District Court,
D. Oregon. PLANNED PARENTHOOD of
the COLUMBIA/WILLIAMETTE, INC.; et al.,
Plaintiffs,
v.
AMERICAN COALITION OF LIFE ACTIVISTS; et al.,
Defendants.
Civil No. 95-1671-JO.

Sept. 18, 1996.

Stephen S. Walters, Stoel Rives, Portland, OR, Maria T. Vullo, Paul, Weiss, Rifkind, Wharton & Garrison, New York City, Roger K. Evans, Legal Action for Reproductive Rights, Planned Parenthood Federation of America, Inc., New York City, for Plaintiffs.

William D. Bailey, Bailey & Wolfe, Portland, OR, David T. Daulton, Berean Law Group, P.C., Norfolk, VA, Mark Belz, Belz & Jones, P.C., St. Louis, MO, Norman L. Lindstedt, Lindstedt Buono & Gordon, Portland, OR, Michael P. Tierney, John M. McSherry, Legal Center for the Defense of Life, New York City, Chris Ferrara, American Catholic Lawyers Association, Fairfield, NJ, for Defendants.

Michael H. Simon, Andrew J. Bowman, Chin See Ming, Perkins Coie, Portland, OR, for Amicus Curiae.

OPINION AND ORDER

ROBERT E. JONES, District Judge:

Plaintiffs filed this lawsuit against Defendants,[1] alleging violations of the Freedom of Access to Clinics Act of 1994 ("FACE"), 18 U.S.C.A. § 248 (1996), the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. § 1962 (1988), Oregon RICO ("ORICO"), Oregon Revised Statutes ("ORS") 166.720 (1995), and Oregon state tort law. This action is before this Court on Defendants' Motion to Dismiss Plaintiffs' Complaint (# 103, # 104, # 112), and Motion for Judgment on the pleadings (# 114).

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[1] "Plaintiffs" include two not-for-profit corporations and several individual Plaintiffs: Planned Parenthood of the Columbia/Willamette, Inc. ("Planned Parenthood"), Portland Feminist Women's Health Center ("Portland Feminist"), Robert Crist, M.D., Warren Hern, M.D., Elizabeth Newhall, M.D., James Newhall, M.D., and Karen Sweigert, M.D. The two corporate Plaintiffs operate clinics and provide health services including abortions. The individual Plaintiffs are all doctors who perform abortions.

"Defendants" include two Portland-based associations and several individual Defendants: the American Coalition of Life Activists ("ACLA"), Advocates for Life Ministries ("ALM"), Michael Bray, Andrew Burnett, David Crane, Timothy Dreste, Michael Dodds, Joeseph Foreman, Charles McMillan, Stephen Mears, Monica Miller, Bruce Murch, Catherine Ramey, David Stover, Donald Treshman, Charles Wysong. The two associational Defendants oppose abortions and all the individual Defendants have allegedly been involved with ACLA and other anti-abortion organizations. ALM coordinates the Northwest Region of ACLA.

When collectively referring to the individual Plaintiffs or Defendants, they shall be termed "Individual Plaintiffs" or "Individual Defendants."

FACTUAL ALLEGATIONS

Plaintiffs allege that the Individual Defendants formed the American Coalition of Life Activists ("ACLA") with the intention to use "harassment, intimidation and threats of violence in order to cause violent acts and to drive plaintiffs out of business." Compl. ¶ 38. ACLA causes violent acts primarily through publication of "wanted" or "unwanted" posters which mimic law enforcement posters seeking the arrest of criminals. *Id.* ¶ 39. Specifically, in January 1995, ACLA and the Individual Defendants released a "wanted" poster (the "Deadly Dozen List") which listed names, home addresses, and some telephone numbers of thirteen physicians, including three Plaintiffs Hern, Elizabeth Newhall, and James Newhall, who perform abortions. *Id.* ¶ 40-41, Ex. A.

The Deadly Dozen List states that the individuals listed are "Guilty of Crimes Against Humanity" and offers a "$5,000 Reward for information leading to arrest, conviction and revocation of license to practice medicine." *Id.*, Ex. A. Plaintiffs claim that the Deadly Dozen List "suggests an objective that requires the capture and punishment of the individuals named in the poster." *Id.* ¶ 41. Moreover, Plaintiffs state that the Deadly Dozen List is reasonably perceived by Plaintiffs to be a threat of force against Plaintiffs, as demonstrated by the following: (1) Defendants made threatening statements in connection with release of the Deadly Dozen List; (2) in response to release of the Deadly Dozen List, the Federal Bureau of Investigation and United States Department of Justice offered the doctors on the Deadly Dozen List protection 24 hours a day; and (3) attacks on physicians occurred after release of similar type posters. *Id.* ¶ 43. Indeed, Plaintiffs' allegations show a sustained temporal pattern in which a

physician is shot to death shortly after his picture appears on a "wanted" poster (Exs. C, D, and E; as alleged *Id.* ¶¶ 53, 55; 56, 58; and 60, 68). Exhibits A and B, like Exhibit E, the distribution of which preceded the shooting of Dr. Britton, his wife, and volunteer escort, contain the specific language "crimes against humanity." All five posters contain descriptions which specifically identify each physician.

After the Deadly Dozen List was distributed, Defendant McMillian publicly encouraged violence against abortionists on March 27, 1995:

> "More violence is inevitable, and it is righteous. * * * It wouldn't bother me if every abortionist in the country today fell dead from a bullet."

Id. ¶ 45 (quoting Defendant McMillian). In addition, Defendant Bray sells bumper stickers that read, "'Execute Murderers-Abortionists.'" *Id.* (quoting Defendant Bray's Bumper Stickers). Both Defendants Crane and Ramey also sported these bumper stickers.

Furthermore, an illustration in the July 1995 issue of the *Life Advocate*[2] depicted a pot of thick liquid on which is drawn a map of four cities where abortionists have been killed. The illustration also depicted several cans, each bearing the name of an abortionist, from which the contents were being poured into the pot. Next to the illustration is a biblical quote referring to the shedding of blood. *Id.* ¶ 46. Plaintiff alleges that "[t]his picture obviously is

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[2] This magazine is published and distributed by ALM. Compl. ¶ 18. Specifically, Defendant Burnett publishes the magazine, Defendant Ramey is associate editor of the magazine, and Defendant Stover contributes to the magazine. Compl. ¶¶ 20, 29, 30.

intended to be an endorsement of the prior murders and shootings of abortion providers and to cause further violence against members of the plaintiff classes."[3] *Id.*

Finally, in August 1995, during a convention in St. Louis, Missouri, "defendants, acting in furtherance of their conspiracy, unleashed a new wave of threatening posters into interstate commerce * * * that target for violence physicians who provide abortions * * * ." *Id.* ¶ 47-48. One of the posters targets Plaintiff Crist by including his name, home and work addresses, and his photograph. *Id.* ¶ 48, Ex. B. In addition, during the convention, Defendants released several posters which targeted abortion clinics. *Id.* ¶ 49.

To provide ~~context to~~ Defendants' activities, Plaintiffs also allege several violent incidents involving abortionists and clinics:

> (1) in March 1993, Dr. David Gunn was murdered after his name, physical description, address, and description of his car, appeared on an "unwanted" poster, *Id.* ¶¶ 53-55, Ex. C;
>
> (2) in August 1993, Dr. George Patterson was murdered after release of a "wanted" poster containing a description of himself and his car, *Id.* ¶¶ 56-58, Ex. D;
>
> (3) in May 1993, after Defendant Treshman stated that "we have been assured~~-~~ that [Dr. Crist] will be monitored and appropriate action

[3] On July 9, 1996, Plaintiffs withdrew their class allegations from the Complaint; therefore, allegations which refer to the class shall be stricken unless they are relevant and apply to the named Plaintiffs in this action.

> will be taken," a shot gun was fired several times into the children's play-room at Plaintiff Crist's home, *Id.* ¶¶ 59-60;
>
> (4) in August 1993, a member of ALM shot Dr. George Tiller after the *Life Advocate* published several articles about him, and Defendants Bray and Stover praised the shooting, *Id.* ¶¶ 61-62;
>
> (5) in July 1994, Dr. James Barrett was murdered after publication of an "unwanted" poster featuring his name, photograph, home address, work and home telephone numbers, and date of birth, *Id.* ¶¶ 66-68, Ex. E;
>
> (6) in November 1994, after Defendant McMillan stated publicly, "Why would a person [assassinate] publicly, when maybe he could have done it clandestinely, with a high-powered rifle * * * ," Dr. Garson Romalis was shot in the leg by a sniper with an assault rifle, *Id.* ¶¶ 73-74;
>
> (7) in December 1994, after the *Life Advocate* noted that Dr. Britton's murder caused other abortionists to resign, a gunman killed two clinic workers at the Planned Parenthood and Preterm Abortion Clinics in Brookline, Massachusetts, as well as fired shots into the Hillcrest Clinic in Norfolk, Virginia, *Id.* ¶¶ 77-78.

Plaintiffs contend that "Defendants' unrelenting threats, including and in connection with the repeated distribution of 'unwanted'-style posters, as noted above, has [sic] aggravated the past violence and has [sic] instilled fear in all plaintiffs that more violence is yet to come if defendants are not stopped." *Id.* ¶¶ 80.

CAUSES OF ACTION

Based on the above allegations, Plaintiffs assert the following seven causes of action:

> (1) Defendants have conspired to violate FACE, 18 U.S.C.A. § 248(a)(1), by intending to injure, threaten and intimidate Plaintiffs through the dissemination of "unwanted"-style posters which target abortion providers like Plaintiffs who are aggrieved persons within the meaning of 18 U.S.C.A. § 248(c)(1)(a);[4]

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[4] Section 248(a)(1) reads:

> **(a) Prohibited activities. – Whoever –**
>
> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services * * * .

Section 248(c)(1)(A) provides a right of action:

> Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that such an action may be brought under subsection (a)(1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services * * * .

In an action under § 248(c)(1)(A), "the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief and compensatory and punitive damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses." 18 U.S.C.A. § 248(c)(1)(B).

Section 248(e)(5) defines "reproductive health services" as "reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counseling or referral services relating to the human reproductive system, including services

(Continued on following page)

(2) Defendants violated FACE, § 248(a)(1), by threatening, injuring, and intimidating Plaintiffs because they are providing "reproductive health services";

(3) Defendants, except ACLA, violated RICO, 18 U.S.C. § 1962(c), by participating and agreeing to participate in the operation or management of ACLA's affairs through a pattern of racketeering activity that involves at least two predicate acts which include publication of the Deadly Dozen List and similar oral or written publications containing threats of force against Plaintiffs;[5]

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relating to pregnancy or the *termination of a pregnancy.*" (Emphasis added).

[5] Section 1962(c) of RICO provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt. Furthermore, Defendants' predicate acts include violations of 18 U.S.C. § 1951 (the "Hobbs Act") and ORS 163.275 (Oregon Coercion Statute). Section 1951(a) of the Hobbs Act reads in relevant part:
>
> (a) Whoever in any way or degree obstructs, delays, or affects commerce * * * by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

Section 163.275(1) of the Oregon coercion statute defines the crime of coercion and reads in relevant part:

> (1) a person commits the crime of coercion when the person compels or induces another person to engage in conduct from which the other person has a legal right to abstain, or

(Continued on following page)

(4) Defendants, except ACLA, violated 18 U.S.C. § 1962(d) by conspiring to violate RICO as a result of agreeing to the commission of two or more of the predicate acts;[6]

(5) Defendants violated ORICO, ORS 166.720(3), for the same reasons evinced under Plaintiffs' federal RICO claims;[7]

(6) Defendants violated ORS 166.720(4) by conspiring to violate ORICO;[8]

(7) Finally, Defendants' intentional conduct transgresses the bounds of socially tolerable conduct and caused Plaintiffs to suffer emotional

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to abstain from engaging in conduct in which the other person has a legal right to engage, by means of instilling in the other person a fear that, if the other person refrains from the conduct compelled or induced or engages in conduct contrary to the compulsion or inducement, the actor or another will:

(a) Unlawfully cause physical injury to some person; or

(b) Unlawfully cause damage to property; or

(c) Engage in conduct constituting a crime; or * * * (e) Cause or continue a strike, boycott or other collective action injurious to some person's business, except that such a threat shall not be deemed coercive when the act or omission compelled is for the benefit of the group in whose interest the actor purports to act * * *.

[6] Section 1962(d) prohibits conspiracies to violate RICO: "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

[7] Section 166.720(3) makes it "unlawful for any person employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt."

[8] Section 166.720(4) prohibits "any person to conspire or endeavor to violate any of the provisions of subsections (1), (2) or (3) of this section."

distress which is actionable under Oregon tort law.

Plaintiffs request a declaration that Defendants' conduct violates FACE, RICO, ORICO, and state law, and is not protected by the First Amendment of the United States Constitution. Furthermore, Plaintiffs seek an injunction preventing Defendants from continuing to violate FACE, ORICO, and any other laws by publishing the Deadly Dozen List and similar posters. In sum, Plaintiffs demand compensatory damages of at least $200 million, punitive damages of at least $300 million, and treble damages of at least $300 million.

In response to Plaintiffs' allegations, Defendants moved to dismiss the Complaint under Fed.R.Civ.P. 12(b)(2) for lack of personal jurisdiction, under Rule 12(b)(6) for failure to state a claim, and under Rule 12(c) for judgment on the pleadings. I examine these motions below.

STANDARD

On a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, plaintiff bears the burden of establishing jurisdiction. *Farmers Ins. Ex. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 912 (9th Cir.1990). However, "[w]here [as here] a district court acts on a defendant's motion to dismiss under Rule 12(b)(2) without holding an evidentiary hearing, the plaintiff need make only a prima facie showing of jurisdictional facts to withstand the motion to dismiss." *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir.1995). That is, plaintiff need only demonstrate facts that if true would support jurisdiction over the defendant. *Id.*

A Rule 12(b)(6) motion to dismiss for failure to state a claim can be granted only if it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Parks School of Business, Inc. v. Symington,* 51 F.3d 1480, 1484 (9th Cir.1995); *Mountain High Knitting, Inc. v. Reno,* 51 F.3d 216, 218 (9th Cir.1995). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *National Wildlife Federation v. Espy,* 45 F.3d 1337, 1340 (9th Cir.1995); *Everest and Jennings v. American Motorists Ins. Co.,* 23 F.3d 226, 228 (9th Cir.1994). Similarly, a Rule 12(c) motion for "judgment on the pleadings is appropriate when, even if all allegations in the complaint are true, the moving party is entitled to judgment as a matter of law." *Westlands Water Dist. v. Firebaugh Canal,* 10 F.3d 667, 670 (9th Cir.1993) (citing *Hal Roach Studios v. Richard Feiner & Co.,* 896 F.2d 1542, 1550 (9th Cir.1990)).

DISCUSSION

Although many of the Defendants filed separate Motions to Dismiss and briefs in support of those motions, most of the arguments address identical issues or adopted analyses in other Defendants' memoranda. Therefore, unless otherwise designated, I consolidate and address the Defendants' contentions together.

Defendants maintain that this Court lacks personal jurisdiction over Defendants and they also attack each of Plaintiffs' seven causes of action. I address each ground for dismissal in turn.

I. Personal Jurisdiction

A. Individual Defendants' Arguments[9]

Defendants contend that this Court may not assert general jurisdiction over them for several reasons: (1) they were not physically served with the Complaint in Oregon; (2) they are not domiciled in Oregon; (3) they do not engage in substantial activities in Oregon; and (4) they did not expressly consent to this Court's exercise of jurisdiction over them. In addition, this Court cannot assert long-arm jurisdiction over Defendants because Plaintiffs' allegations do not sufficiently show that Defendants distributed threatening posters which were used or consumed in Oregon through the ordinary course of trade. Finally, Defendants argue that long-arm jurisdiction would also violate their due process rights because: (1) Defendants have not purposefully availed themselves of the privileges in Oregon; (2) Defendants' activities have not arisen out of forum-related activities; and (3) extension of jurisdiction would be unreasonable.

B. Plaintiffs' Arguments

In opposition, Plaintiffs assert that the Court may properly exercise jurisdiction because, through their activities with ACLA, Defendants are responsible for publication and distribution of the Dirty Dozen List which intentionally targets two Oregon physicians, Drs. James and Elizabeth Newhall, who are Plaintiffs in this action.

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[9] Specifically, Defendants Mears, Dodds, Miller, Treshman, Dreste, Foreman, and Wysong join in this argument. These Defendants reside in the following states, respectively: New Hampshire, Kansas, Wisconsin, Maryland, Missouri, California, and Tennessee.

Because Defendants directed their anti-abortion efforts directly against Oregon residents, they had purposeful contact with Oregon which resulted in the injury that is the subject of this lawsuit.

C. Analysis

Although seven Defendants join in Defendants Mears' and Dodds' argument in support of dismissal for lack of personal jurisdiction, only Defendants Mears, Dodds, Treshman, and Miller raised the defense of lack of personal jurisdiction in their first responsive pleading. Defendants Foreman, Wysong, and Dreste failed to dispute personal jurisdiction in their Answer. "A general appearance or responsive pleading by a defendant that fails to dispute personal jurisdiction will waive any defect in service or personal jurisdiction." *Benny v. Pipes,* 799 F.2d 489, 492 (9th Cir.1986) (citing Fed.R.Civ.P. 12(h)(1)), *cert. denied,* 484 U.S. 870, 108 S.Ct. 198, 98 L.Ed.2d 149 (1987). Therefore, Defendants Foreman, Wysong and Dreste waived their right to dispute personal jurisdiction, and I address this argument only with respect to Defendants Mears, Dodds, Miller, and Treshman.

Personal jurisdiction over a non-resident defendant is tested by a two-part analysis: the exercise of jurisdiction must (1) satisfy the requirements of the applicable federal statute governing personal jurisdiction,[10] or if none exists,

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[10] RICO contains an applicable provision governing service of process, 18 U.S.C. § 1965(b) which provides:

> In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may

(Continued on following page)

the long-arm statute of the state in which the district court sits; and (2) comport with principles of federal due process. *Terracom v. Valley Nat. Bank,* 49 F.3d 555, 559 (9th Cir.1995). Oregon's long-arm statute, ORCP 4, confers

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cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

In federal question cases, a court has personal jurisdiction over non-resident defendants only if they are amenable to service of process and the exercise of jurisdiction comports with due process. *Omni Capital International v. Rudolf Wolff & Co.,* 484 U.S. 97, 111, 108 S.Ct. 404, 413, 98 L.Ed.2d 415 (1987). Section 1965(b) of RICO allows nationwide service provided that "the court * * * ha[s] personal jurisdiction over at least one of the participants in the alleged multidistrict conspiracy and the plaintiff * * * show[s] that there is no other district in which a court will have personal jurisdiction over all of the alleged co-conspirators." *Butcher's Union Local No. 498 v. SDC Inv., Inc.,* 788 F.2d 535, 539 (9th Cir.1986). Therefore, section 1965(b) permits a district court to exercise jurisdiction over all RICO co-conspirators if the court has personal jurisdiction over only one of the defendants. *See Hawkins v. Upjohn Co.,* 890 F.Supp. 601, 606 (E.D.Tex.1994) (examining whether only one of several RICO co-conspirator defendants was subject to the Texas long-arm statute within the due process limits).

Although § 1965(b) does not completely obviate the need for applying the traditional due process "minimum contacts" analysis with respect to the forum State, plaintiffs need only show that this court could exercise personal jurisdiction, without offending due process, over one of the RICO co-conspirators. Conversely, under the traditional "minimum contacts" analysis, to comport with due process, a defendant must have certain "minimum contacts" with the forum State and "[e]ach defendant's contacts with the forum State must be assessed individually." *Calder v. Jones,* 465 U.S. 783, 788-90, 104 S.Ct. 1482, 1486-87, 79 L.Ed.2d 804 (1984).

In the present action, several alleged co-conspirator Defendants reside in Oregon; therefore, under section 1965(b), this Court has nationwide jurisdiction over all other co-conspirator Defendants. Consequently, the traditional "minimum contacts" analysis is not required for Plaintiffs' RICO claims. Nevertheless, I examine personal jurisdiction of the non-resident Defendants with regard to the other federal and state law claims.

jurisdiction to the extent permitted by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Gray & Co. v. Firstenberg Machinery Co.*, 913 F.2d 758, 760 (9th Cir.1990) (citing ORCP 4L;[11] *Oregon ex rel. Hydraulic Servocontrols Corp. v. Dale*, 294 Or. 381, 384, 657 P.2d 211 (1982)). Therefore, because Oregon's long-arm statute is coextensive with the outer limits of federal due process, I need only analyze the second prong of the personal jurisdiction test. *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1405 (9th Cir.1994).

"The Due Process Clause of the Fourteenth Amendment to the United States Constitution permits personal jurisdiction over a defendant in any State with which the defendant has 'certain minimum contacts * * * such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' [citation omitted]." *Calder v. Jones*, 465 U.S. 783, 788, 104 S.Ct. 1482, 1486, 79 L.Ed.2d 804 (1984) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945)). For a defendant to be subject to general personal jurisdiction, he must have such "continuous and systematic contacts with the forum that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice." *Reebok Intern. Ltd. v. McLaughlin*, 49 F.3d 1387, 1391 (9th Cir.1995), *cert. denied*, 516 U.S. 908, 116 S.Ct. 276, 133 L.Ed.2d 197

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[11] Oregon's long-arm statute, ORCP 4, lists several specific instances where the court may exercise personal jurisdiction over a defendant, and then adds in ORCP 4L, "Notwithstanding a failure to satisfy the requirement of sections B through K of this rule, [a court has personal jurisdiction] in any action where prosecution of the action against a defendant in this state is not inconsistent with the Constitution of this state or the Constitution of the United States."

(1995). However, where, as here, the defendant's contacts with the forum are not continuous and systematic, the forum may exercise only specific personal jurisdiction, which is determined by the following three-part test:

> "(1) The nonresident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
>
> (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
>
> (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable."

Id. (quoting *Core-Vent Corp. v. Nobel Industries AB,* 11 F.3d 1482, 1485 (9th Cir.1993)).

1. Purposeful Availment

"This purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or third person." *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985) (citations and internal quotation marks omitted) (merely contracting with a resident of a forum state is insufficient to confer specific jurisdiction over a nonresident). Different standards for purposeful availment apply to tort cases, as compared to contract cases. *Ziegler v. Indian River County,*

64 F.3d 470, 473 (9th Cir.1995) (extended specific jurisdiction to nonresident defendants who caused plaintiff to be unlawfully arrested in the forum state). Unlike a contract case (e.g. *Burger King*), in a tort case, "jurisdiction may attach if an out-of-forum defendant merely engages in conduct aimed at, and having effect in, the situs state." *Ziegler,* 64 F.3d at 473 (citing *Roth v. Garcia Marquez,* 942 F.2d 617, 621 (9th Cir.1991)).

"[T]he three elements of purposeful availment in tort cases are: (1) intentional action; (2) aimed at the forum state; and (3) causing harm that the defendant should have anticipated would be suffered in the forum state." *Ziegler,* 64 F.3d at 474 (citing *Core-Vent* at 1486). The lack of physical contact with the forum does not necessarily defeat jurisdiction. *Calder,* 465 U.S. at 788, 104 S.Ct. at 1486 (personal jurisdiction proper where nonresident's wrongdoing is intentionally directed at a resident); *Ziegler,* 64 F.3d at 474.

In the present action, Plaintiffs assert a claim under state tort law, as well as claims under FACE, RICO, ORICO, which all involve tortious-type conduct. Therefore, in determining whether Defendants purposefully availed themselves of this forum, I apply the analysis for tort cases, set forth in *Ziegler.*

According to Plaintiffs' factual allegations, Defendant ACLA, "acting through and in active concert with each of the other defendants, publicly announced and released into interstate commerce" the Deadly Dozen List which targeted two Oregon Plaintiffs by listing their names and addresses. Compl. ¶ 40, Ex. A. "Defendants intended for the Deadly Dozen List to instill fear in the doctors specifically named therein * * * [and] have distributed and

continue to distribute the Deadly Dozen List throughout the United States, with the intent to spread their message of violence against plaintiffs and to intimidate plaintiffs and cause them serious physical and emotional harm." Compl. ¶¶ 41, 43. As Plaintiffs document in their Complaint, lists or posters similar to those distributed by Defendants have resulted in death or injury to other doctors who perform abortions.

These factual allegations show that Defendants targeted two Oregon doctors with the intention to instill fear in the doctors and cause them serious physical and emotional harm. Therefore, the purposeful availment requirements of *Ziegler* are easily met: Defendants' wrongful conduct was aimed directly at two Oregon doctors who Defendants knew were in Oregon and who Defendants clearly anticipated and hoped would suffer the intended harm. Consequently, I find that all Defendants purposefully availed themselves of Oregon law.

2. Arising Out Of

The claims arise out of a defendant's forum-related activities if plaintiff would not have a cause of action "but for" defendant's contacts with the forum. *Ziegler,* 64 F.3d at 474. The "but for" test should not be narrowly applied; rather, the requirement is merely designed to confirm that there is some nexus between the cause of action and defendant's contact with the forum. *Shute v. Carnival Cruise Lines,* 897 F.2d 377, 385 (9th Cir.1990), *rev'd on other grounds,* 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991). As in *Ziegler,* there is no dispute in this case that "but for" the contacts between Defendants and Oregon, the Oregon Plaintiffs would not have suffered the

injury which is the subject of this lawsuit against Defendants. *Ziegler* 64 F.3d at 474. Therefore, Plaintiffs' alleged injuries arise out of Defendants' contact with Oregon.

3. Reasonableness of Exercising Jurisdiction

In determining whether exercise of jurisdiction is reasonable, the court must weigh all of the following seven factors:

> (1) the extent of the defendant's purposeful injection [sic] into the forum;
>
> (2) the defendant's burdens from litigating in the forum;
>
> (3) the extent of conflict with the sovereignty of the defendant's state;
>
> (4) the forum state's interest in adjudicating the dispute;
>
> (5) the most efficient judicial resolution of the controversy;
>
> (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and
>
> (7) the existence of an alternative forum.

Ziegler, 64 F.3d at 475 (citing *Terracom v. Valley Nat. Bank,* 49 F.3d 555, 561 (9th Cir.1995)). No single factor is dispositive. *Terracom* at 561 (citing *Core-Vent,* 11 F.3d at 1488). I address each factor in turn.

a. Purposeful Interjection

"[T]he extent of interjection is to be considered: 'Even if there is sufficient interjection into the state to satisfy the [purposeful availment prong], the degree of interjection is a factor to be weighed in assessing the overall reasonableness of jurisdiction under the [reasonableness prong]." *Core-Vent,* 11 F.3d at 1488 (quoting *Insurance Company of North America v. Marina Salina Cruz,* 649 F.2d 1266, 1271 (9th Cir.1981) (internal quotation marks omitted)). Like *Ziegler,* where Florida defendants caused a California plaintiff to be arrested in California, in this case, Defendants significantly interjected into Oregon by publishing and nationally distributing threats directed at two Oregon Plaintiffs. The harmful effects in Oregon caused by Defendants' actions were not merely incidental; rather, Defendants intentionally directed their actions towards Oregon so that the Oregon Plaintiffs would be physically and emotionally injured. *See Ziegler,* 64 F.3d at 475 ("[defendants] intentionally directed their actions towards California, for the purpose of having [plaintiff] arrested there and extradited. Their purposeful injection [sic] into California was significant."). Consequently, Defendants' significant interjection into Oregon, for the purpose of injuring the Oregon Plaintiffs, weighs in favor of exercising jurisdiction here.

b. Burden on Defense

The second factor concerns Defendants' burden in litigating this case in Oregon. Unlike other cases involving nonresident defendants, the four Defendants in this case who challenge personal jurisdiction in Oregon are each from a different State: New Hampshire, Kansas, Wisconsin, and Maryland. As a collective group, no one State is

less burdensome than another for the Defendants. However, for each individual Defendant, their resident State is obviously less burdensome than Oregon because none of the Defendants have significant physical contacts with Oregon. Accordingly, the burden on each Defendant in litigating in Oregon tips slightly in Defendants' favor.

c. Conflict with Nonresident State's Sovereignty

Although Defendants' States may have an interest in protecting their residents' rights under the First Amendment to the United States Constitution, their States have little interest in resolving claims which involve unprotected tortious conduct of their residents, as alleged by Plaintiffs. Therefore, interference with the sovereignty of the nonresident States is minimal and this third factor favors jurisdiction.

d. Forum State's Interest

Like other States, Oregon maintains a strong interest in providing an effective means of redress for its residents who are tortiously injured. *See Core-Vent,* 11 F.3d at 1489 (noting that California maintains a strong interest in providing redress to its residents who are tortiously injured). Therefore, this fourth factor also supports exercising personal jurisdiction.

e. Efficiency

Similarly, the fifth factor also weighs in favor of exercising jurisdiction in Oregon because Oregon contains more parties to this lawsuit than any other State. In

evaluating this factor, the Ninth Circuit instructs that the court should look "'primarily at where the witnesses and the evidence are likely to be located.'" *Ziegler,* 64 F.3d at 475-76 (quoting *Core-Vent,* 11 F.3d at 1489). Because the parties will be witnesses in this action, Oregon contains a larger number of witnesses than any other single State. Although the four Defendants who oppose jurisdiction do not reside in Oregon, the following co-defendants are physically present in Oregon: ACLA, ALM, Burnett, Ramey, and Stover. Furthermore, five of the Plaintiffs are also located in Oregon: Planned Parenthood, Portland Feminist, Elizabeth Newhall, James Newhall, and Karen Sweigert. Therefore, Oregon is the most efficient forum for resolution of this matter.[12]

f. Importance of Forum to Plaintiffs

Obviously, Plaintiffs would prefer to litigate in Oregon, but "mere preference on the part of the plaintiff for its home forum does not affect the balancing * * * ." *Core-Vent,* 11 F.3d at 1490. Plaintiffs have not suggested that they cannot obtain identical relief in other States. However, the overwhelming majority of parties are physically present in Oregon; thus, it would be foolish to require Plaintiffs to seek redress in some other State where personal jurisdiction as to other Defendants may be

[12] The Court is mindful that this factor has recently been discounted because "'[m]odern advances in communications and transportation have significantly reduced the burden of litigating [out-of-state].'" *Caruth v. International Psychoanalytical Ass'n,* 59 F.3d 126, 129 (9th Cir.1995) (quoting *Sinatra v. National Enquirer,* 854 F.2d 1191, 1199 (9th Cir.1988)).

lacking. This factor neither adds nor detracts from the reasons for exercising jurisdiction in Oregon.

g. Unavailability of Alternative Forum

As with the sixth factor above, Plaintiffs do not argue that no other forum exists. " 'Plaintiff bears the burden of proving the unavailability of an alternative forum.' " *Ziegler,* 64 F.3d at 476 (quoting *Core-Vent,* 11 F.3d at 1490). Clearly, Plaintiffs could sue in another State. However, Plaintiffs' failure to satisfy this factor has little effect on the determination to exercise jurisdiction in this case.

h. Balancing Factors

In sum, factors 1 (purposeful interjection), 3 (non-forum States' sovereignty), 4 (Oregon's interest), and 5 (efficiency), favor the Plaintiffs. At best, factors 2 (burden on Defendants), 6 (importance of forum to Plaintiffs), and 7 (alternative forum), tip in favor of Defendants. However, Defendants' purposeful interjection, Oregon's interest in providing redress to its residents, and efficiency, decisively tip the balance in Plaintiffs' favor towards exercising jurisdiction.

"Once purposeful availment has been established, the forum's exercise of jurisdiction is *presumptively reasonable.* To rebut that presumption, a defendant must present a *compelling* case that the exercise of jurisdiction would, in fact, be unreasonable." *Ziegler,* 64 F.3d at 476 (quoting *Roth v. Garcia Marquez,* 942 F.2d at 625 (internal quotation marks omitted; emphasis in original)). Because the balance of factors strongly favors Plaintiffs, Defendants cannot overcome the presumption that exercising jurisdiction

would be reasonable. Consequently, this Court has specific personal jurisdiction over the non-resident Defendants who timely challenged jurisdiction: Mears, Dodds, Treshman, and Miller. Likewise, this Court has personal jurisdiction over all other Defendants because they either reside or are principally located in Oregon, or they waived their right to object to personal jurisdiction under Fed.R.Civ.P. 12(h)(1).

II. Prohibition Of Speech Protected By The First Amendment

A. Defendants' Arguments

Addressing the merits of Plaintiffs' claims, Defendants contend that Plaintiffs impermissibly seek to prohibit speech protected by the First Amendment. Defendants' anti-abortion protests are speech and may not be proscribed merely because they are offensive and intimidating to Plaintiffs. Furthermore, Defendants' oral statements and posters do not fall within the "fighting words" exception to protected speech because that expression does not incite imminent lawless action which is likely to occur. In fact, Plaintiffs failed to alleged that their anti-abortion expressions either incite imminent violence or are likely to produce the violence. Therefore, based upon the undisputed allegations in the Complaint, Defendants' expressions are not "fighting words" and must be protected.

B. Plaintiffs' Arguments

Contrary to Defendants' characterization of Plaintiffs' theory, Plaintiffs do not contend that Defendants' expression must incite imminent violence to be forbidden. Instead, they argue that Defendants' actions constitute "true

threats" which are prohibited by FACE and not protected by the First Amendment. Although Defendants' expression does not expressly threaten Plaintiffs, they assert that the expression becomes a "true threat" when placed in context. Therefore, by alleging the context surrounding Defendants' expression and its effect upon Plaintiffs, Plaintiffs have alleged sufficient facts to support the conclusion that Defendants' expression constitutes "true threats" which are not protected speech under the First Amendment.

C. Analysis

Plaintiffs seek to prohibit Defendants' conduct under FACE, 18 U.S.C. § 248, which regulates three types of activities: (1) the use of "force," (2) "threat[s] of force," and (3) "physical obstruction." 18 U.S.C. § 248(a). Only the second proscribed activity, "threats of force," constitutes expressive conduct eligible for protection under the First Amendment. *See Wisconsin v. Mitchell,* 508 U.S. 476, 484-85, 113 S.Ct. 2194, 2198-99, 124 L.Ed.2d 436 (1993) ("[a] physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment"). Furthermore, FACE only forbids "threats of force" that "intimidate" which is defined as to "place a person in reasonable apprehension of bodily harm" *Id.* § 248(e)(3).

"True threats" are not protected by the First Amendment. *Watts v. United States,* 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) (upholding statute that criminalized threats of violence against the president but concluding that the statement, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.," was political hyperbole and not a "true threat" given its context); *see also R.A.V. v. St. Paul, Minn.,* 505 U.S. 377, 388, 112 S.Ct.

2538, 2546, 120 L.Ed.2d 305 (1992) ("threats of violence are outside the First Amendment"); *Melugin v. Hames,* 38 F.3d 1478, 1484-86 (9th Cir.1994) (upholding constitutionality of statute, as interpreted by the Alaska Court of Appeals, which criminalized threats of death or physical injury). However, statutes which punish "a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind." *Watts,* 394 U.S. at 707, 89 S.Ct. at 1401. Therefore, "[w]hat is a threat must be distinguished from what is constitutionally protected speech." *Id.* Consequently, to the extent Plaintiffs seek to prohibit "true threats" under FACE, the First Amendment is not violated.[13] The issue then is determining whether Defendants' expressive conduct constitutes a "true threat."

The Ninth Circuit recently restated the objective test used to resolve the issue of whether a threat is a true threat:

> "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." *United States v. Orozco-Santillan,* 903 F.2d 1262 (9th Cir.1990). Furthermore, "[a]lleged

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[13] Contrary to Defendants' assertions, Plaintiffs are not pursuing an incitement to violence theory, *see Brandenburg v. Ohio,* 395 U.S. 444, 447, 89 S.Ct. 1827, 1829, 23 L.Ed.2d 430 (1968) (expression which likely incites others to imminent violence is unprotected under the First Amendment), but rather allege that Defendants intended to harm specific Plaintiffs, as evidenced by Defendants' threats. *See United States v. Dinwiddie,* 76 F.3d 913, 922 n. 5 (8th Cir.1996) ("The *Brandenburg* test applies to laws that forbid inciting someone to use violence against a third party. It does not apply to statutes, like FACE, that prohibit someone from directly threatening another person"), *petition for cert. filed,* (U.S. Aug. 6, 1996) (No. 96-5615).

> threats should be considered in light of their entire factual context, including the surrounding events and the reaction of the listeners." *Id.* (citing *United States v. Gilbert,* 884 F.2d 454, 457 (9th Cir.1989), *cert. denied,* 493 U.S. 1082, 110 S.Ct. 1140, 107 L.Ed.2d 1044 (1990) and *United States v. Mitchell,* 812 F.2d 1250, 1255 (9th Cir.1987)); *accord United States v. Kelner,* 534 F.2d 1020 (2d Cir.) ("So long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific * * * as to convey a gravity of purpose and imminent prospect of execution, the statute may properly be applied."), *cert. denied,* 429 U.S. 1022, 97 S.Ct. 639, 50 L.Ed.2d 623 (1976).

Lovell v. Poway Unified School District, 90 F.3d 367, 372 (9th Cir.1996). Under this test, the plaintiff need not prove that the defendant had the ability or actually intended to physically harm the plaintiff. *Melugin,* 38 F.3d at 1485. "Moreover, the issue whether the [plaintiff] has shown a 'true threat' is a question of fact for the jury, not a question of law for the court." *Id.* (citing *United States v. Khorrami,* 895 F.2d 1186, 1192 (7th Cir.1990)).

In *Lovell,* a student told a school counselor, "If you don't give me this schedule change, I'm going to shoot you!" *Lovell,* 90 F.3d at 369. The counselor informed the school about the student's statement; in response, the school suspended the student. *Id.* The student's parents filed suit on behalf of the student, claiming, in part, that the suspension violated the student's First Amendment rights by punishing her speech. *Id.* at 370. The Ninth Circuit concluded that the suspension did not violate the student's First Amendment rights because threats of violence are not protected speech and "[a] reasonable

person in these circumstances would have foreseen that [the counselor] would interpret that statement as a serious expression of intent to harm." *Id.* at 372. Thus, a true threat exists if the target of the speaker reasonably believes that the speaker has the ability to act him or herself or to influence others to act at a level less than incitement – it is the perception of a reasonable person that is dispositive, not the actual intent of the speaker.

Unlike in *Lovell,* the alleged threats in this case are not so easily identified in the Complaint. Nevertheless, federal notice pleading standards are not strict and motions to dismiss are not granted "unless it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claims which would entitle [them] to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). Plaintiffs allege that "Defendants have distributed and continue to distribute the Deadly Dozen List throughout the United States, with the intent to spread their message of violence against plaintiffs and to intimidate plaintiffs and cause them serious physical and emotional harm." Compl. ¶ 43, Ex. A. Furthermore, "[b]y creating and circulating [a poster targeting Plaintiff Crist], the defendants intend to place Dr. Crist * * * in reasonable fear of bodily harm should he continue to perform abortions * * * ." *Id.* ¶ 48, Ex. B. Viewing the Deadly Dozen List and the Crist poster in the factual context of previous "unwanted" – style posters which listed names of other doctors who were subsequently assaulted or murdered, I cannot conclude as a matter of law that a reasonable person in these circumstances would not foresee that the Plaintiffs would interpret the Deadly Dozen List and Crist poster as serious expressions of intent to harm. *See Lovell,* 90 F.3d at 372-73 ("Alleged

threats should be considered in light of their entire factual context, including the surrounding events and the reaction of the listeners. * * * Given the level of violence in public schools today, it is no wonder that [the counselor] felt threatened. * * * [Nevertheless,] the final result turns upon whether a reasonable person in these circumstances should have foreseen that his or her words would have this effect." (internal quotation marks omitted)). Therefore, Defendants have not shown that Plaintiffs can prove no set of facts in support of their claim because Defendants' speech may be unprotected "true threats."[14]

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[14] Defendants raised several new arguments in their Reply Brief, to which Plaintiffs have not been given an opportunity to respond. Defendants contend that (1) their expressions are not express threats and the context cannot convert the expressions into threats, (2) Defendants' expressions were public threats which must be likely to cause imminent lawless action to be actionable, and (3) the court, not a jury, determines whether a "true threat" exists.

First, although the Deadly Dozen List and the Crist poster made their alleged threats implicitly, instead of expressly stating, "We're going to kill you!," the threats are no less fearsome when couched in the context of the effect of previous posters, as well as statements by Defendants like Defendant McMillian who said, shortly after the murder of two doctors who were listed on posters, "In my opinion a sure way for the abortionists to be safe would be to have a cease-fire – the abortionists stop killing babies, then anti-abortionists would stop shooting abortionists." Compl. ¶ 69. Nothing in the objective test for "true threats" suggests that the threat of violence must be express. *See Lovell*, 90 F.3d at 372; *see also United States v. Gilbert*, 884 F.2d 454, 455-57 (9th Cir.1989) (examining what a letter and enclosed poster *implied* to determine whether they constituted an unprotected threat), *cert. denied*, 493 U.S. 1082, 110 S.Ct. 1140, 107 L.Ed.2d 1044 (1990).

Second, the fact that the threats were publicly announced instead of privately stated does not affect the test for determining whether the threat is a "true threat." For instance, it would be absurd if a plaintiff would have to satisfy the stringent standard of imminent lawless action where the speaker threatens the plaintiff using a public television broadcast, but only have to show that a reasonable person would

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However, the Court agrees with the observation by the American Civil Liberties Union ("ACLU"), as *amicus curiae,* that Plaintiffs do not clearly separate the expression that constitutes a "true threat" from the context of the expression.[15] In addition, Plaintiffs do not clearly identify the individual Defendants who are responsible for the threats. "Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." *N.A.A.C.P. v. Claiborne Hardware Co.,* 458 U.S. 886, 920, 102 S.Ct. 3409, 3429, 73 L.Ed.2d 1215 (1982). Therefore, Plaintiffs are given leave to amend their Complaint in order to clearly distinguish between the allegedly actionable and the contextual expressions, as well as specifically name the individual Defendants who intended to further the alleged threats of violence.[16]

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foresee that the recipient would interpret the threat as a serious expression of an intent to harm where the speaker threatens the plaintiff in a private letter.

Third, as stated earlier in this Opinion, contrary to Defendants' assertions, the jury determines whether a threat constitutes a "true threat." *See Melugin,* 38 F.3d at 1485 (citing *United States v. Khorrami,* 895 F.2d 1186, 1192 (7th Cir.1990), *cert. denied,* 498 U.S. 986, 111 S.Ct. 522, 112 L.Ed.2d 533 (1990)).

[15] In ruling on this motion, the Court interpreted the Complaint as attacking only the Deadly Dozen List and the Crist poster, with all other expressions providing factual context.

[16] Furthermore, Plaintiffs should be aware that there are serious questions concerning each Plaintiff's standing to assert the causes of action in the Complaint. I decline to resolve the issue at this juncture because Defendants have not raised it, but standing should be addressed by the parties as soon as possible. *See National Organization*

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III. Constitutionality Of FACE

A. Defendants' Arguments

Defendants argue that FACE violates the Commerce Clause because it regulates activity which is not sufficiently connected to interstate commerce. Second, the Fourteenth Amendment does not authorize Congress to regulate solely private conduct through FACE. Third, Defendants contend that FACE is facially unconstitutional under the First Amendment for several reasons: (1) the statute impermissibly bans speech based on its anti-abortion viewpoint; (2) FACE imposes a content-based restriction by regulating speech based upon whether it intimidates the listener; and (3) FACE is unconstitutionally vague and overbroad because it fails to define key terms and regulates speech that does not fall within the categories of "fighting words" or "imminent threats of lawless action."

B. Plaintiffs' Arguments

Plaintiffs respond by arguing first that Congress rationally concluded that the conduct regulated by FACE (*e.g.*, violence, threats of violence, and physical obstructions aimed at persons who provide abortions) affects interstate commerce. Furthermore, Congress crafted FACE so that it was reasonably tailored to regulate such conduct. Therefore, Congress properly regulates such conduct under the Commerce Clause.

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for Women, Inc. v. Scheidler, 510 U.S. 249, 255, 114 S.Ct. 798, 802, 127 L.Ed.2d 99 (1994) ("Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation").

Second, Plaintiffs reject Defendants' suggestion that FACE must regulate state action, in order to be valid under the Fourteenth Amendment. The relevant inquiry is whether Congress possessed authority under the Constitution for enacting FACE, not whether Congress seeks to regulate state action.

Third, Plaintiffs maintain that FACE passes constitutional muster under the First Amendment because it is viewpoint and content neutral. In addition, FACE is not constitutionally overbroad because it regulates only unprotected expression. Moreover, the statute is also not unconstitutionally vague because it clearly defines the prohibited activity.

C. Analysis

In relevant part, FACE enables persons who provide or seek reproductive services to recover civil remedies against anyone who:

> [B]y force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services * * *.

18 U.S.C.A. § 248. Defendants' constitutional attacks of this statute are addressed individually below.

1. Commerce Clause

The Constitution delegates to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., Art. I, § 8, cl. 3. "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce [citation omitted], *i.e.*, those activities that substantially affect interstate commerce." *United States v. Lopez,* 514 U.S. 549, ___, 115 S.Ct. 1624, 1629-30, 131 L.Ed.2d 626 (1995) (struck down the Gun-Free School Zones Act of 1990 which criminalized possession of firearms in school zones because the statute failed to regulate activity that substantially affects interstate commerce) (citing *Maryland v. Wirtz,* 392 U.S. 183, 196 n. 27, 88 S.Ct. 2017, 2024 n. 27, 20 L.Ed.2d 1020 (1968)). "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Lopez,* 514 U.S. at ___, 115 S.Ct. at 1630. "'Even activity that is purely intra-state in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations.'" *Hodel v. Virginia Surface Min. & Reclam. Ass'n,* 452 U.S. 264, 277, 101 S.Ct. 2352, 2360, 69 L.Ed.2d 1 (1981) (holding that the Surface Mining Control and Reclamation Act of 1977, which mandates compliance with environmental standards, did not contravene the Commerce Clause) (quoting *Fry v. United States,* 421 U.S. 542, 546, 95 S.Ct. 1792, 1795, 44 L.Ed.2d 363 (1975)).

In determining whether a particular exercise of congressional power is valid under the Commerce Clause, "[t]he court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is

any rational basis for such a finding." *Hodel,* 452 U.S. at 276, 101 S.Ct. at 2360. "This established, the only remaining question for the judicial inquiry is whether 'the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution.'" *Hodel,* 452 U.S. at 276, 101 S.Ct. at 2360 (quoting *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 262, 85 S.Ct. 348, 360, 13 L.Ed.2d 258 (1964)) (concluding that Congress had authority under the Commerce Clause to enact the Civil Rights Act of 1964 because restaurants that discriminated served fewer customers, and therefore suppressed interstate commerce).

In the present action, Congress made the following findings when it enacted FACE:

> (1) An interstate campaign of violent, threatening, obstructive and destructive conduct aimed at providers of reproductive health services across the nation has injured providers of such services and their patients, and the extent and interstate nature of this conduct place it beyond the ability of any single state or local jurisdiction to control;
>
> (2) Such conduct, which has included blockades and invasions of medical facilities, arson and other destruction of property, assaults, death threats, attempted murder and murder, infringes upon the exercise of rights secured by federal and state law, both statutory and constitutional;
>
> (3) Such conduct also burdens interstate commerce by forcing patients to travel from states where their access to reproductive health services is obstructed to other states, and by interfering with the interstate commercial activities of health care providers, including the purchase and lease of facilities and equipment, sale of

> goods and services, employment of personnel and generation of income, and purchase of medicine, medical supplies, surgical instruments and other supplies from other states * * * .

H.R.Conf.Rep. No. 488, 103d Cong., 2d Sess. 7 (1994), *reprinted in* 1994 U.S.C.C.A.N. 699, 724; *see also* H.R.Rep. No. 306, at 6-10 (1993) *reprinted in* 1994 U.S.C.C.A.N. 699, 703-707 (explaining the need for federal remedies to protect patients and providers of reproductive health services); *see also* S.Rep. No. 117, at 31-32 (1993).

Based upon its extensive findings, Congress rationally concluded that violence, threats of force, and physical obstructions directed at persons seeking or providing reproductive health services substantially affect interstate commerce. Furthermore, all circuits which have addressed the issue agree that Congress rationally concluded that the activity regulated by FACE substantially affects interstate commerce. *See United States v. Soderna,* 82 F.3d 1370, 1373-74 (7th Cir.1996), *petition for cert. filed,* 65 U.S.L.W. 3086 (U.S. July 26, 1996) (No. 96-141); *United States v. Dinwiddie,* 76 F.3d 913, 920-21 (8th Cir.1996), *petition for cert. filed,* (U.S. Aug. 6, 1996) (No. 96-5615); *United States v. Wilson,* 73 F.3d 675, 680-83 (7th Cir.1995), *petition for cert. filed,* 64 U.S.L.W. 3669 (Mar. 20, 1996) (No. 95-1523); *Cheffer v. Reno,* 55 F.3d 1517, 1519-21 (11th Cir.1995); *American Life League, Inc. v. Reno,* 47 F.3d 642, 647 (4th Cir.1995), *cert. denied,* 516 U.S. 809, 116 S.Ct. 55, 133 L.Ed.2d 19 (1995). I agree with the Fourth Circuit in *Reno,* which concluded that "Congress also chose regulatory means reasonably adapted to permissible ends [because] [t]he Act's criminal and civil penalties are designed to deter violent, obstructive and destructive conduct." 47 F.3d at 647 (listing the Act's permissible ends). Therefore,

in accord with all circuit courts that have examined whether Congress permissibly invoked its commerce power to enact FACE, I conclude that FACE is a constitutional exercise of Congress' power under the Commerce Clause.[17]

2. First Amendment

The First Amendment of the United States Constitution provides, in part, that "Congress shall make no law * * * abridging the freedom of speech * * * ." "The First Amendment generally prevents government from proscribing speech, *see, e.g., Cantwell v. Connecticut,* 310 U.S. 296, 309-311 [60 S.Ct. 900, 905-06, 84 L.Ed. 1213] (1940), or even expressive conduct, *see, e.g., Texas v. Johnson,* 491 U.S. 397, 406 [109 S.Ct. 2533, 2540-41, 105 L.Ed.2d 342] (1989), because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid." *R.A.V. v. St. Paul, Minn.,* 505 U.S. 377, 382, 112 S.Ct. 2538, 2542, 120 L.Ed.2d 305 (1992). Furthermore, "[w]hen the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. *See R.A.V. v. St.*

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[17] In so holding, I reject Defendants' argument that a different result is compelled by *Lopez,* 514 U.S. 549, 115 S.Ct. 1624 (1995), for two reasons: (1) unlike the extensive congressional findings which accompanied FACE, in *Lopez,* Congress made no findings which explained how the statute regulated activity affecting interstate commerce; and (2) unlike FACE's regulation of commercial activity with regard to the provision of health services, the statute in *Lopez* did not regulate any commercial activity. *See Dinwiddie,* 76 F.3d at 921; *Wilson,* 73 F.3d at 683-84; *Cheffer,* 55 F.3d at 1520.

Because I hold that FACE is within Congress' commerce authority, I need not consider Defendants' argument that Congress does not have authority under the Fourteenth Amendment to enact FACE.

Paul, 505 U.S. 377, 391 [112 S.Ct. 2538, 2547-48, 120 L.Ed.2d 305] (1992). Viewpoint discrimination is thus an egregious form of content discrimination." *Rosenberger, et al., v. Rector and Visitors of the University of Virginia, et al.*, 515 U.S. 819, ___, 115 S.Ct. 2510, 2516, 132 L.Ed.2d 700 (1995). "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* (citing *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983)).

Regulations which "suppress, disadvantage, or impose differential burdens upon speech because of its content" are valid under the First Amendment only if they survive strict scrutiny, *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, ___, 114 S.Ct. 2445, 2459, 129 L.Ed.2d 497 (1994), which requires Congress to "show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Simon & Schuster v. New York Crime Victims Bd.*, 502 U.S. 105, 118, 112 S.Ct. 501, 509, 116 L.Ed.2d 476 (1991). However, where the regulation is content-neutral, it need only satisfy "an intermediate level of scrutiny," *Turner*, 512 U.S. at ___, 114 S.Ct. at 2459, which upholds the regulation if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968); *see also Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983) (applying intermediate level of scrutiny to time,

place, and manner restrictions on speech). Therefore, I must first determine whether FACE is content and viewpoint neutral, and then apply the proper level of scrutiny under the First Amendment.

a. Content- and Viewpoint-Based

Several circuits have addressed the issue of whether FACE is content- and viewpoint-based, and I concur in their well-reasoned conclusions. *See Dinwiddie,* 76 F.3d 913, 923 (8th Cir.1996); *American Life League,* 47 F.3d 642, 651 (4th Cir.1995); *Cheffer,* 55 F.3d 1517, 1521 (11th Cir.1995) (expressly adopting rationale set forth in *American Life League*). However, I offer a brief analysis in addition to the Eighth, Fourth, and Eleventh Circuits' discussions.

As discussed earlier in Part II.C. of this Opinion, FACE regulates the use of force, threats of force, and physical obstruction, which are activities that are not protected under the First Amendment. The fact that application of FACE is based upon whether the victim of a threat of violence is placed in "reasonable apprehension of bodily harm," does not cause the statute to become content-based, like the ordinance in *Forsyth County, Ga. v. Nationalist Movement,* 505 U.S. 123, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992),[18] because threats of violence are not

[18] In *Forsyth,* the Supreme Court struck down an ordinance which calculated permit fees for parades based on the cost of security for parade participants which varied depending on the listeners' reaction to the speech. 505 U.S. at 134-36, 112 S.Ct. at 2403-05. The Court noted that the administrator, in assessing the cost of the permit, would necessarily have to examine the contents of the message conveyed, estimate the response of others to that content, and judge the number

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protected under the First Amendment. *See Dinwiddie,* 76 F.3d at 922.

Furthermore, FACE is not viewpoint-based merely because its application is limited to force, threats of force, or physical obstruction against a person because that person obtains or provides reproductive health services. Congress may "single[] out" specific types of conduct "because this conduct is thought to inflict greater individual or societal harm," *Mitchell,* 508 U.S. at 487-88, 113 S.Ct. at 2201 (upholding statute that enhances sentences for crimes motivated by racial bias), so long as no distinction is made based upon the expressive content or viewpoint of the conduct, *see R.A.V.,* 505 U.S. 377, 391-94, 112 S.Ct. 2538, 2547-49 (striking down ordinance that regulated certain types of "fighting words" which insulted or provoked violence "on the basis of race, color, creed, religion or gender" because the ordinance distinguished application based on the content and viewpoint of the "fighting words").

Unlike the ordinance in *R.A.V.,* FACE is not viewpoint-based because it prohibits all conduct regardless of the violator's viewpoint so long as that conduct is directed towards a person merely because that person obtains or provides reproductive health services. *See R.A.V.,* 505 U.S. at 390, 112 S.Ct. at 2546-47 ("Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy."); *see also*

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of police necessary to meet that response. *Id.* at 134, 112 S.Ct. at 2403. However, *Forsyth,* unlike the present action, involved speech protected under the First Amendment.

Dinwiddie, 76 F.3d at 923; *American Life League,* 47 F.3d at 650-51.[19] The mere fact that a class of persons with a particular viewpoint are more likely to violate the statute does not render the law a viewpoint-based regulation of speech. *See Madsen v. Women's Health Center, Inc.,* 512 U.S. 753, ___, 114 S.Ct. 2516, 2524, 129 L.Ed.2d 593 (1994) ("That petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order" which established a 36-foot buffer zone from which demonstrators were prohibited); *see, e.g., O'Brien,* 391 U.S. 367, 88 S.Ct. 1673 (upholding a statutory prohibition on burning draft cards despite the fact that most violators would likely oppose the Vietnam War).

Consequently, like the Eighth, Fourth, and Eleventh Circuits, I conclude that FACE is a content-neutral and viewpoint-neutral regulation. Therefore, I apply an intermediate level of scrutiny to determine whether the statute's incidental burdens on protected speech violate the First Amendment.[20]

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[19] Moreover, FACE's proscription of conduct directed at persons *because* they obtain or provide reproductive medical services is not content- or viewpoint-based because statutes may proscribe conduct based upon the motive of the violator without impermissibly regulating the content of the expression. *See, e.g., Hishon v. King & Spalding,* 467 U.S. 69, 78, 104 S.Ct. 2229, 2235, 81 L.Ed.2d 59 (1984) (upholding Title VII which makes it unlawful for an employer to discriminate against an employee "*because of* such an individual's race, color, religion, sex, or national origin.") (quoting 42 U.S.C. § 2000e-2(a)(1) (emphasis added)).

[20] Arguably, if FACE only regulates unprotected speech in a content- and viewpoint-neutral manner, I need not even apply the intermediate level of scrutiny to FACE. *Melugin,* 38 F.3d at 1483-84 (statutes which regulate unprotected expression need only be "rationally related to a

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b. Intermediate Scrutiny Under *O'Brien*

A statute survives intermediate scrutiny if (1) it is content-neutral, (2) it furthers an important or substantial governmental interest, and (3) the restriction is narrowly tailored to further that interest. *O'Brien,* 391 U.S. at 377, 88 S.Ct. at 1679. "To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests." *Turner,* 512 U.S. 622, ___, 114 S.Ct. 2445, 2469. "Rather, the requirement of narrow tailoring is satisfied so long as the * * * regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 799, 109 S.Ct. 2746, 2758, 105 L.Ed.2d 661 (1989)) (internal quotation marks omitted).

FACE furthers the government's "strong interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy," *Madsen,* 512 U.S. at ___, 114 S.Ct. at 2526 (citing *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)), as well as the government's interest in "protecting patients and staff from violence and harm and protecting reproductive health facilities from physical destruction or damage." *American Life League,* 47 F.3d at 651. These interests are substantial and support any incidental burdens on protected speech caused by FACE, so long as the burdens are

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legitimate state interest"). However, because FACE's regulation of unprotected conduct "'incidentally affect[s] some conduct with protected expressive elements, such as peaceful but obstructive picketing,'" *Dinwiddie,* 76 F.3d at 923 (quoting *American Life League,* 47 F.3d at 648), I must consider whether these burdens on protected speech violate the First Amendment under intermediate scrutiny.

no greater than necessary to further the government's interests. FACE regulates only force, threats of force, and physical obstruction; thus, it "'leaves open ample alternative means for communication,'" and is narrowly tailored to further the government's interests. *Dinwiddie,* 76 F.3d at 923 (quoting *American Life League,* 47 F.3d at 652) ("In a non-violent, non-obstructive manner, protestors may still stand and express their anti-abortion message. They may still proclaim their views and make their pleas by voice, signs, handbills, symbolic gestures and other expressive means").

In sum, I conclude, as did the Eighth, Fourth, and Eleventh Circuits, that FACE serves substantial government interests in preventing violence and preserving access to reproductive health services, and is narrowly tailored to further those interests, without targeting the content of the expression. *See Dinwiddie,* 76 F.3d at 924; *American Life League,* 47 F.3d at 652; *Cheffer,* 55 F.3d at 1521-22.

c. Vagueness and Overbreadth

In addition, I reject Defendants' argument that FACE is unconstitutionally vague because terms like "obstruction," "interference," and "threat of force" are unclear, and "intimidate" is based upon the subjective reaction of third parties. "A statute is void for vagueness when it does not sufficiently identify the conduct that is prohibited." *United States v. Wunsch,* 84 F.3d 1110, 1119 (9th Cir.1996). Therefore, the statute must "be sufficiently clear so as not to cause persons 'of common intelligence * * * necessarily [to] guess at its meaning and [to] differ as to its application[.]'"

Id. (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926)).

In the present action, all the challenged terms, except for "threat of force," are defined by the statute. For instance, FACE defines "intimidate" as to "place a person in reasonable apprehension of bodily harm to him- or herself or to another," "interfere with" as to "restrict a person's freedom of movement," and "physical obstruction" as "rendering impassable ingress to or egress from a facility that provides reproductive health services * * * ." 18 U.S.C. § 248(e)(2), (3), and (4). These specific and clear definitions, by themselves, are sufficient to defeat Defendants' vagueness challenge. Nonetheless, further support for this conclusion is found in *United States v. Gilbert*, 813 F.2d 1523 (9th Cir.1987), where the Ninth Circuit held that the terms "threat of force," "intimidate," and "interfere with," as used in the Fair Housing Act, 42 U.S.C. § 3631 (1982) (prohibits anyone who "by force or threat of force * * * intimidates or interferes with * * * any person because of his race, color, religion, sex, or national origin * * * ") are not unconstitutionally vague.[21] 813 F.2d at 1530. In so holding, the court emphasized that "legislation which proscribes the use of force or the threat of force should not be found to be void for vagueness." *Id.* I see no reason for a different result in this case; FACE is not unconstitutionally vague. *See Dinwiddie*, 76 F.3d at 924;

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[21] Likewise, in *Cameron v. Johnson*, the Supreme Court rejected a vagueness challenge to an anti-picketing ordinance which included the terms "interfere with" and "obstruct." 390 U.S. 611, 612 n. 1, 616, 88 S.Ct. 1335, 1336 n. 1, 1338, 20 L.Ed.2d 182 (1968) (ordinance prohibited "picketing * * * in such a manner as to *obstruct* or unreasonably *interfere with* free ingress or egress to and from any * * * county * * * courthouses * * * .") (Emphasis added).

Cheffer, 55 F.3d at 1521-22, *American Life League,* 47 F.3d at 653.

Likewise, I also reject Defendants' contention that FACE is unconstitutionally overbroad because it regulates speech that does not fall within two of the categories of exclusion from First Amendment protection: "fighting words" or "imminent threats of lawless action." As discussed earlier in Part II.C. of this Opinion, Plaintiffs do not claim that Defendants' actions constitute "fighting words" or an "incitement to imminent violence," but rather allege that Defendants are directing threats of violence at Plaintiffs. Therefore, the analyses under the "fighting words" and "incitement to imminent violence" doctrines do not apply here. Moreover, because true threats of violence are similarly not protected, I must reject Defendants' argument that FACE is overbroad.

Accordingly, I reject Defendants' vagueness and overbreadth arguments and hold that FACE does not violate the First Amendment. Furthermore, I also conclude that Plaintiffs have alleged sufficient facts to state a claim that Defendants' "unwanted"-style posters constitute "threats of violence" under FACE and overcome Defendants' Motion to Dismiss, pursuant to FRCP 12(b)(6).

However, although Plaintiffs succeed at this point in the litigation, there are several troubling issues with regard to their FACE claim that Plaintiffs may need to address in order to survive a motion for summary judgment: (1) whether all Plaintiffs have standing to assert a claim under FACE, (2) which specific conduct by Defendants constitutes "true threats," and (3) whether sufficient evidence warrants submitting to the jury the issue of whether Defendants' alleged conduct constitutes "true

threats." At this early stage of the case, accepting all of Plaintiffs' factual allegations as true, I cannot say as matter of law that Plaintiffs have not stated a claim under FACE, but I harbor significant doubts as to whether Plaintiffs will possess sufficient evidence to create a material issue of fact for trial.

IV. RICO

To state a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO), a plaintiff must show that the conduct of an enterprise, through a pattern of racketeering activity, injured plaintiff's business or property. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496, 105 S.Ct. 3275, 3285, 87 L.Ed.2d 346 (1985). A "pattern" of racketeering activity does not exist unless there is evidence of at least two predicate acts. *Brady v. Dairy Fresh Products Co.*, 974 F.2d 1149, 1152 (9th Cir.1992). "Racketeering activity" is any act indictable under several provisions of Title 18 of the United States Code. *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 541 (9th Cir.1989) (citing 18 U.S.C. § 1961(1)) (listing the offenses).

Defendants attack Plaintiffs' RICO and ORICO claims on several grounds.[22] I address each of Defendants' contentions in turn.

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[22] Note that the arguments pertaining to RICO are equally applicable to ORICO because the statutes are interpreted consistently. *Pincetich v. Jeanfreau*, 699 F.Supp. 1469, 1475 (D.Or.1988); *Ius v. Butcher*, 680 F.Supp. 343, 346 n. 1 (D.Or.1987); *Schnitzer v. Oppenheimer & Co., Inc.*, 633 F.Supp. 92, 99 (D.Or.1985); *Ahern v. Gaussoin*, 611 F.Supp. 1465, 1494 (D.Or.1985).

Cheffer, 55 F.3d at 1521-22, *American Life League,* 47 F.3d at 653.

Likewise, I also reject Defendants' contention that FACE is unconstitutionally overbroad because it regulates speech that does not fall within two of the categories of exclusion from First Amendment protection: "fighting particularity RICO predicate acts" (*i.e.,* violations of federal and state criminal law) allegedly committed by Defendants.

In opposition to Defendants' Motion to Dismiss, Plaintiffs contend that they pleaded Defendants' "predicate acts" with sufficient particularity by alleging that Defendants' threats of violence in furtherance of a plan to commit extortion and/or coercion violated the Hobbs Act, 18 U.S.C. § 1951, and Oregon's coercion statute, ORS 163.275.

2. Analysis

Allegations of fraud must be stated with particularity. Fed.R.Civ.P. 9(b). Likewise, RICO claims based upon predicate acts involving fraud must be pleaded with particularity under Rule 9(b). *See Lancaster Comm. Hosp. v. Antelope Valley Hosp. Dist.,* 940 F.2d 397, 405 (9th Cir.1991) (applying Rule 9(b) to allegations of mail fraud as RICO predicate acts), *cert. denied,* 502 U.S. 1094, 112 S.Ct. 1168, 117 L.Ed.2d 414 (1992); *Alan Neuman Productions, Inc. v. Albright,* 862 F.2d 1388, 1392 (9th Cir.1988) (applying Rule 9(b) to allegations of mail and wire fraud as

[23] Rule 9(b) states in relevant part, "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

RICO predicate acts), *cert. denied,* 493 U.S. 858, 110 S.Ct. 168, 107 L.Ed.2d 124 (1989); *Sun Sav. and Loan Ass'n v. Dierdorff,* 825 F.2d 187, 196 (9th Cir.1987).

However, as in this case, where the alleged RICO predicate acts do not involve fraud, the more lenient pleading standard in Rule 8(a) applies.[24] *See McLaughlin v. Anderson,* 962 F.2d 187, 194 (2nd Cir.1992) (distinguishing pleading standard for RICO claims involving fraud as compared to extortion, and holding that district court erred in applying Rule 9(b) to plaintiff's extortion claim: "the district court should have evaluated the [extortion] claim against the more lenient pleading standards of [Rule] 8(a)."); *Rose v. Bartle,* 871 F.2d 331, 356 n. 33 (3rd Cir.1989) ("It should be noted that the plaintiffs allege no mail, wire or other fraud by the defendants, and therefore are not required to adhere to the higher pleading standard of 'particularity' mandated by Fed.R.Civ.P. 9(b)"); *Vicom, Inc. v. Harbridge Merchant Servs., Inc.,* 20 F.3d 771, 776 (7th Cir.1994) (unless the RICO claim involves fraud, it must conform only to the standards set out in Rule 8). Because Plaintiffs allege RICO predicate acts involving

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[24] Rule 8(a) requires:

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain
>
> (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it;
>
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and
>
> (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

extortion under 18 U.S.C. § 1951 (the Hobbs Act) and coercion under ORS 163.275 (Oregon Coercion Statute), rather than fraud, their RICO claims need not be pleaded with particularity under Rule 9(b).[25]

Under the liberal federal notice pleading standards under Rule 8, Plaintiffs need only provide "fair notice" of the claim being asserted and the "grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 45-46, 48, 78 S.Ct. 99, 101-02, 103, 2 L.Ed.2d 80 (1955). With regard to the RICO predicate acts of extortion and coercion, Plaintiffs have easily satisfied this liberal standard by alleging that Defendants violated 18 U.S.C. § 1951 and ORS 163.275 through issuing and disseminating the Deadly Dozen List, as well as other "unwanted"-style posters and publications which contain threats of force against Plaintiffs in order to induce fear in Plaintiffs and "thus to force plaintiffs to forego their right to engage in lawful activity and give up their actual and prospective business relations." Compl. ¶¶ 96-97. These allegations provide sufficient notice to Defendants of the predicate acts of extortion and coercion underlying Plaintiffs' RICO claims.

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[25] Defendants cite *Schnitzer v. Oppenheimer & Co., Inc.*, 633 F.Supp. 92 (D.Or.1985), for the proposition that all RICO claims must be pleaded with particularity because "'RICO's *in terrorem* effect is potent, in that a RICO defendant faces the unsavory label 'racketeer' as well as the risk of treble damages.'" Miller and Treshman Mem.Supp.Mot.Dismiss at 24 (quoting *Schnitzer*, 633 F.Supp. at 97). However, that case is inapplicable to the present action because the predicate acts in *Schnitzer* were wire and mail fraud, 633 F.Supp. at 96, whereas the predicate acts here are extortion and coercion.

B. Predicate Acts: Hobbs Act and Oregon Coercion Statute

1. Arguments

Second, Defendants contend that Plaintiffs' RICO claims fail because the predicate act allegations under the Hobbs Act and the Oregon Coercion Statute are flawed for the following reasons: (1) Plaintiffs' do not state an extortion claim under the Hobbs Act because they fail to allege that Defendants unlawfully obtained Plaintiffs' property, and (2) the Oregon Coercion Statute, ORS 163.275, cannot be the basis for a RICO predicate act because ORS 163.275 is unconstitutionally overbroad.

In response, Plaintiffs maintain that they have presented a Hobbs Act extortion claim by alleging that Defendants prevented them from making business decisions free from threats. Furthermore, Plaintiffs properly rely on the Oregon Coercion Statute because the Oregon legislature corrected any overbreadth concerns in the statute after the Oregon Supreme Court declared it unconstitutional.

2. Analysis

a. Hobbs Act

"'The elements of a Hobbs Act violation are extortion and a nexus with interstate commerce.'" *United States v. Hoelker,* 765 F.2d 1422, 1424 (9th Cir.1985) (quoting *United States v. Zemek,* 634 F.2d 1159, 1173 (9th Cir.1980), *cert. denied,* 450 U.S. 916, 101 S.Ct. 1359, 67 L.Ed.2d 341, 450 U.S. 985, 101 S.Ct. 1525, 67 L.Ed.2d 821 & 452 U.S. 905, 101 S.Ct. 3031, 69 L.Ed.2d 406 (1981)), *cert. denied,* 475 U.S. 1024, 106 S.Ct. 1219, 89 L.Ed.2d 330 (1986). The

Hobbs Act defines "extortion" as "the obtaining of *property* from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2) (emphasis added). "The concept of property under the Hobbs Act has not been limited to physical or tangible 'things.' The right to make business decisions and to solicit business free from wrongful coercion is a protected property right." *Zemek,* 634 F.2d at 1174 (citing *United States v. Santoni,* 585 F.2d 667, 672-73 (4th Cir.1978) (property extorted was the right of victim to make a business decision free from outside pressure wrongfully imposed), *cert. denied,* 440 U.S. 910, 99 S.Ct. 1221, 59 L.Ed.2d 459 (1979)) (other citations omitted); *see also Hoelker,* 765 F.2d at 1425 (property right involved was right to make business decisions free from threats and coercion); *see, e.g., Northeast Women's Center, Inc. v. McMonagle,* 868 F.2d 1342, 1350 (3d Cir.1989) (abortion center could recover on RICO claim based upon Hobbs Act extortion violation by protestors who used force and threats of force to close the center, regardless of whether the protestors actually succeeded, because the center had a property right to continue to operate its business), *cert. denied,* 493 U.S. 901, 110 S.Ct. 261, 107 L.Ed.2d 210 (1989).

In this case, Plaintiffs allege that Defendants' threats of force contained in the Deadly Dozen List, "unwanted"-style posters, and similar publications "have decreased the volume of business of plaintiffs or increased their cost of doing business, or both." Compl. ¶ 97-99. Moreover, "Defendants' activities also have injured the named plaintiffs * * * by depriving them of the right to engage in a business relationship with actual and prospective patients, to reap the economic advantages of those relationships, and to

enter into such relationships free of threats of force." *Id.* ¶ 99. Defendants have allegedly caused Plaintiffs to suffer $50 million in economic damage. *Id.* ¶ 100. I find that these allegations sufficiently identify injury to Plaintiffs' property right to engage in their business without threats of violence, and are sufficient to state an extortion claim under the Hobbs Act.

b. Oregon Coercion Statute: ORS 163.275

Plaintiffs' ORICO claims are based upon the predicate act of coercion which is defined under ORS 163.275 (1995) and set forth in relevant part as follows:

> (1) A person commits the crime of coercion when the person compels or induces another person to engage in conduct from which the other person has a legal right to abstain, or to abstain from engaging in conduct in which the other person has a legal right to engage, by means of instilling in the other person a fear that, if the other person refrains from the conduct compelled or induced or engages in conduct contrary to the compulsion or inducement, the actor or another will:
>
> > (a) Unlawfully cause physical injury to some person; * * *.

The Oregon Supreme Court struck down a former version of the Oregon Coercion Statute, ORS 163.275 (1971), as unconstitutionally overbroad under Article I,

section 8, of the Oregon Constitution[26] because that version impermissibly burdened protected speech. *State v. Robertson,* 293 Or. 402, 436, 649 P.2d 569 (1982).[27] Subsequent to *Robertson,* however, the Oregon Legislature redrafted the statute in order to correct its overbreadth. According to the Oregon Court of Appeals, the current, redrafted version of at least ORS 163.275(1)(a) passes constitutional muster provided that the "fear" which is "instilled" in the other person is objectively reasonable, the physical injury that is feared is objectively reasonable, and the "some person" to whom injury is threatened is some specific person. *State v. Stone,* 84 Or.App. 575, 578, 735 P.2d 7 (1987), *rev. denied,* 303 Or. 700, 740 P.2d 1213 (1987).[28]

Plaintiffs do not specify which subsections of the Oregon Coercion Statute that they assert as ORICO predicate acts. Defendants challenge the constitutionality of all subsections other than § 163.275(1)(a) which was

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[26] Article I, section 8, of the Oregon Constitution provides: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever * * * ."

[27] Specifically, the former version was overbroad because it covered "all demands to take or to refrain from nonobligatory action coupled with threats of adverse consequences in case of noncompliance, whether these demands and threats are stated privately or publicly and irrespective of the relationship of the parties themselves or with the public." *Id.* at 436.

[28] The court in *Stone* noted that there is some disagreement as to whether the *Robertson* court declared the whole statute invalid or just subsection 163.275(1)(e), the section under which the defendant in *Robertson* was charged. *Stone,* 84 Or.App. at 575 n. 1, 735 P.2d 7. The court did not resolve the disagreement, but rather severed 163.275(1)(a) from the rest of the statute for constitutional scrutiny. Consequently, *Stone*'s holding only expressly applies to ORS 163.275(1)(a). No court has interpreted any other subsection of the statute.

upheld in *Stone*. However, I will not engage in a blanket constitutional inquiry of the Oregon Coercion Statute if Plaintiffs only rely on subsection (1)(a). Therefore, without clear direction, this Court will assume that Plaintiffs only rely on subsection (1)(a). If this assumption is incorrect, Plaintiffs may amend their Complaint to include additional subsections, and Defendants may attack the constitutionality of the other subsections of the Oregon Coercion Statute on which Plaintiffs rely.

Although Plaintiffs do not allege specific facts showing that Defendants *actually* committed coercion, *see State v. Johnson*, 110 Or.App. 362, 363, 822 P.2d 153 (1991) ("[c]oercion requires proof that the victim was *actually compelled or induced* to abstain from engaging in the conduct in which she had a right to engage or not to engage" (emphasis added)), Plaintiffs may nonetheless pursue claims under ORICO because "racketeering activity" under ORICO includes *attempts* to commit coercion. *See* ORS 166.715(6)(a)(I). Therefore, to prove an ORICO claim, Plaintiffs need only show that Defendants *attempted* to commit coercion, not that Defendants actually violated the Oregon Coercion Statute by coercing Plaintiffs. I find that Plaintiffs have alleged sufficient facts showing that Defendants attempted to coerce Plaintiffs from providing abortions by publishing and disseminating threats of physical harm directed at Plaintiffs.[29]

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[29] For the same reasons, Plaintiffs have also stated a claim under the Oregon Menacing Statute which provides: "(1) A person commits the crime of menacing if by word or conduct the person intentionally attempts to place another person in fear of imminent serious physical injury." ORS 163.190. A violation of the Oregon Menacing Statute may be a predicate act under ORICO. *See* ORS 166.715(6)(a)(G).

C. Standing to Assert RICO Claims

1. Argument

Third, Defendants contend that even if Plaintiffs properly pleaded extortion and coercion as RICO predicate acts, Plaintiffs do not have standing under RICO because they fail to allege concrete financial loss as a result of the RICO violations. Plaintiffs did not respond to this argument.

2. Analysis

RICO authorizes a private civil action by "[a]ny person injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c). Private litigants have standing under RICO only to the extent that they have been injured in their business or property by the conduct constituting the RICO violation. *Sedima, S.P.R.L. v. Imrex Company,* 473 U.S. 479, 495-96, 105 S.Ct. 3275, 3284-85, 87 L.Ed.2d 346 (1985). "[I]njuries to property are not actionable under RICO unless they result in tangible financial loss to the plaintiff." *Oscar v. University Students Co-op Ass'n,* 965 F.2d 783, 785 (9th Cir.1992) (diminution in enjoyment of leasehold interest does not constitute a tangible loss to tenant who did not allege any out-of-pocket expenditures as a direct or indirect result of the racketeering activity), *cert. denied,* 506 U.S. 1020, 113 S.Ct. 655, 656, 121 L.Ed.2d 581 (1992); *Steele v. Hospital Corporation of America,* 36 F.3d 69 (9th Cir.1994) (depletion of insurance funds by excess medical payments does not constitute a financial loss to patients). Likewise, speculative injuries do not confer standing under RICO, unless they become concrete and actual. *Steele,* 36 F.3d at 71 (claim that father of patient "could have used some of those [insurance]

benefits for myself" was insufficient where father did not specify an instance where he had to pay a claim out of his own funds because the funds had been exhausted); *Oscar,* 965 F.2d at 787 (claim that plaintiff suffered losses in the reduced rent she could charge to sublet her apartment was insufficient where plaintiff did not allege that she had a right to sublet her apartment nor that she ever sublet the apartment or attempted to sublet the apartment); *Imagineering, Inc. v. Kiewit Pacific Co.,* 976 F.2d 1303, 1311 (9th Cir.1992) (claim that plaintiff suffered loss of profits was insufficient where it was impossible to determine whether plaintiffs were alleging lost opportunity to realize profits or loss of specific identifiable profits), *cert. denied,* 507 U.S. 1004, 113 S.Ct. 1644, 123 L.Ed.2d 266 (1993).

In the present action, Plaintiffs allege that Defendants' racketeering activities are directed at Plaintiffs "to force plaintiffs to forego their right to engage in lawful activity and give up their actual and prospective business relations." Compl. ¶ 97. Plaintiffs further allege that "defendants' racketeering activities have decreased the volume of business of plaintiffs or increased their cost of doing business" and "are calculated to induce clinic personnel to give up their jobs and doctors to forego their economic right to practice medicine" which have injured Plaintiffs in an amount not less than $50 million for each RICO and ORICO claim. *Id.* ¶¶ 99-100.

Although Plaintiffs do not specifically identify how they calculated their damages of at least $50 million, I conclude that Plaintiffs have alleged sufficient facts regarding their concrete financial loss to confer standing, according to *National Organization for Women, Inc. v. Scheidler,* 510 U.S. 249, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994). In *Scheidler,* two corporate health care centers

alleged RICO claims under § 1964(c), claiming that defendants "conspired to use threatened or actual force, violence or fear to induce clinic employees, doctors, and patients to give up their jobs, give up their economic right to practice medicine, and give up their right to obtain medical services at the clinics." *Id.* at 253, 114 S.Ct. at 301-02. Plaintiffs further alleged that the conspiracy "injured the business and/or property interests of the petitioner." *Id.* at 253-54, 114 S.Ct. at 802 (internal quotation marks omitted). The Supreme Court held that these allegations stated a claim under RICO for injury to "business or property."[30] *Id.* at 256, 114 S.Ct. at 803. I find that *Scheidler* compels the same result in this case; thus, Plaintiffs have alleged sufficient financial loss to confer standing to assert their RICO claims.[31]

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[30] In so holding, the Court quoted *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992) for the relevant proposition that "'[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.'" *Scheidler*, 510 U.S. at 256, 114 S.Ct. at 803.

It is also noteworthy that the plaintiffs in *Scheidler*, like the Plaintiffs in the present action, alleged extortion in violation of the Hobbs Act as one of the RICO-predicate acts. *Id.* at 253, 114 S.Ct. at 801.

[31] However, as *Scheidler* states, "[s]tanding represents a jurisdictional requirement which remains open to review at all stages of the litigation." *Id.* at 255, 114 S.Ct. at 802. Therefore, if at any time facts show that any of the Plaintiffs lack sufficient injury to confer standing to assert RICO claims, those claims will be dismissed as to that Plaintiff(s).

D. RICO Enterprise and Participatory Conduct

1. Arguments

Fourth, Defendants argue that Plaintiffs' allegations do not show that Defendants' alleged RICO enterprise (*i.e.*, ACLA) is distinct from the pattern of racketeering activities of each Defendant, but rather demonstrate that ACLA exists solely to further Individual Defendants' racketeering activities. Moreover, Plaintiffs failed to adequately allege that Individual Defendants participated in the operation and management of the "enterprise."

Contrary to Defendants' assertions, Plaintiffs argue that they have satisfied the "enterprise" element of RICO by alleging that ACLA exists as a separate entity from the Individual Defendants and is involved in their racketeering activities. In addition, each Individual Defendant violated RICO by participating in the operation and management of the RICO "enterprise," ACLA.

2. Analysis

RICO defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity * * * [or] any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). The enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct," and is "separate and apart from the pattern of activity in which it engages." *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 2528-29, 69 L.Ed.2d 246 (1981)). "Wholly unlawful enterprises fall within RICO's provisions." *Webster v. Omnitrition Intern., Inc.*, 79 F.3d 776, 787 (9th Cir.1996), *petition for cert. filed*, 65 U.S.L.W. (U.S. July 16, 1996) (No. 96-82). In addition, for liability to

attach to individual defendants, plaintiff must show that the individuals participated in the operation or management of the enterprise which requires that the defendant have "some part in directing the enterprise's affairs" for RICO liability to attach. *Reves v. Ernst & Young,* 507 U.S. 170, 179, 185, 113 S.Ct. 1163, 1170, 1173, 122 L.Ed.2d 525 (1993).

The Ninth Circuit in *Chang v. Chen,* 80 F.3d 1293 (9th Cir.1996), recently discussed the minimal requirements to show an enterprise under RICO. A RICO enterprise must exhibit some sort of decision-making structure, and some on-going means of controlling and directing the affairs of the associated group. *Id.* at 1299 (quoting *United States v. Riccobene,* 709 F.2d 214, 222 (3d Cir.1983), *cert. denied,* 464 U.S. 849, 104 S.Ct. 157, 78 L.Ed.2d 145 (1983)). However, it "is not necessary to show that the organization 'has some function wholly unrelated to the racketeering activity.'" *Id.* (quoting *Riccobene,* 709 F.2d at 223-24); *see also United States v. Rogers,* 89 F.3d 1326, 1337 (7th Cir.1996) ("it would be nonsensical to require proof that an enterprise had purposes or goals separate and apart from the pattern of racketeering activity"). "Rather, it is sufficient to show that the organization has an existence beyond that which is merely necessary to commit the predicate acts of racketeering." *Id.* (citing *Riccobene,* 709 F.2d at 224). Therefore, the enterprise's only purpose may be to pursue the racketeering activity of its members, but the "enterprise" must not be one and the same as the "pattern of racketeering."[32] *See Chang,* 80 F.3d at 1300

[32] Contrary to Defendants' assertions, the enterprise need not have an economic motive. *Scheidler,* 510 U.S. 249, 259-62, 114 S.Ct. 798, 805-06.

(dismissing RICO claim, in part, because plaintiffs failed to allege "a structure to the organization beyond that which was inherent in the alleged acts of racketeering activity").

In the present action, the "enterprise" element of RICO is easily satisfied because ACLA exists as a distinct legal entity. ACLA is a national organization composed of individuals who allegedly endorse violence and intimidation as a means of furthering their anti-abortion message. Compl. ¶ 17. All the Individual Defendants have been or are affiliated with ACLA, but ACLA's membership extends beyond the Individual Defendants. Compl. ¶¶ 17, 19-32. ACLA holds various conferences which involve ACLA members from around the nation. Compl. ¶¶ 40, 47. ACLA published and disseminated the Deadly Dozen List which contains ACLA's name and address on the bottom of the list. Compl., Ex. A. Moreover, ACLA published numerous other "wanted"-style posters. Based upon these allegations and the logical inferences, Defendants' suggestion that ACLA does not exist as an anti-abortion organization separate and distinct from the pattern of racketeering activity is absurd. Accordingly, I find that Plaintiffs have satisfied the "enterprise" element of their RICO claims.

In addition, Plaintiffs' allegations support the conclusion that almost all of the Individual Defendants had some part in the operation and management of ACLA, the RICO enterprise. *See Reves,* 507 U.S. 170, 179, 113 S.Ct. 1163, 1170 ("the word 'participate' makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase 'directly or indirectly' makes clear that RICO liability is not limited to those with a formal position in the enterprise, but *some* part in directing the enterprise's affairs is required").

Plaintiffs state that Defendants Burnett, Crane, Dreste, Dodds, Mears, Miller, Murch, Stover, Treshman, and Wysong are, or were, Directors of ACLA during the relevant time period and agreed to publish and disseminate the Deadly Dozen List and other "unwanted"-style posters. Compl. ¶¶ 20-23, 26-28, 30-32, 96. Furthermore, Defendants ALM, Foreman, McMillian, and Ramey all are members of ACLA and allegedly marketed and distributed ACLA publications and other statements threatening the use of force against plaintiffs. Compl. ¶¶ 18, 24-25, 29. I find that Plaintiffs sufficiently allege that these Defendants participated in the operation and management of the RICO enterprise.

However, Defendant Bray is not a member of ACLA and has merely "attended ACLA meetings and * * * promoted ACLA's threatening message." Bray's statements promoting ACLA's anti-abortion message do not constitute participation in the "operation and management" of the enterprise. *See, e.g., Webster,* 79 F.3d 776, 789 (defendant's ministerial role in the enterprise and statements promoting the scheme did not constitute participation in the "operation or management" of the enterprise). Therefore, Plaintiffs' RICO and ORICO claims against only Defendant Bray are dismissed. Plaintiffs have alleged sufficient participation by every other Defendant.

E. RICO Conspiracy

1. Arguments

Lastly, Defendants urge the Court to dismiss Plaintiffs' RICO conspiracy claims because no factual allegations suggest that Individual Defendants conspired and agreed to violate RICO. However, Plaintiffs argue that

Defendants are involved in a conspiracy because each Individual Defendant, through their participation in the "enterprise," (*i.e.*, ACLA) allegedly agreed to violate a substantive RICO provision.

2. Analysis

Section 1962(d) of RICO prohibits "any person to conspire to violate any of the provisions of subsection (a), (b) or (c) of this section." 18 U.S.C. § 1962(d). " 'The essence of a RICO conspiracy is not an agreement to commit racketeering acts, but an *agreement* to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity.' " *United States v. Blinder,* 10 F.3d 1468, 1477 (9th Cir.1993) (quoting *United States v. Brooklier,* 685 F.2d 1208, 1216 (9th Cir.1982), *cert. denied,* 459 U.S. 1206, 103 S.Ct. 1194, 1195, 75 L.Ed.2d 439 (1983)). A RICO conspiracy does not require that each co-conspirator knows all of the details of the plan or conspiracy. *Baumer v. Pachl,* 8 F.3d 1341, 1347 (9th Cir.1993) (dismissed RICO conspiracy claim because no allegations suggested assent to contribute to a common enterprise) (quoting *Brooklier,* 685 F.2d at 1222). Moreover, a co-conspirator need not participate personally in two predicate act offenses. *Blinder,* 10 F.3d at 1477.

Plaintiffs have alleged that "[e]ach defendant agreed with some or all of the other defendants to conduct or participate in the operation, conduct or management of the affairs of ACLA through a pattern of racketeering activity [and] [e]ach defendant further agreed to the commission of two or more predicate acts through which each defendant – as agent of the other defendants and co-conspirators – would conduct or participate in the operation, conduct or

management of ACLA's affairs in violation of 18 U.S.C. § 1962(d)." Compl. ¶ 102. These allegations adequately support Plaintiffs' conspiracy claim. At this stage of the litigation I may not resolve the issue of whether all Defendants, in fact, agreed to participate in the management of the enterprise to commit racketeering activity. *See, e.g., Webster,* 79 F.3d 776, 789 (determining on summary judgment that plaintiff produced no evidence showing that defendants conspired to violate RICO). Plaintiffs have met their initial pleading burden by providing fair notice to Defendants of their RICO conspiracy against Defendants.

In sum, Plaintiffs have alleged sufficient facts to support their RICO and ORICO claims, as well as their RICO and ORICO conspiracy claims. However, Plaintiffs' allegations regarding Defendant Bray's involvement in ACLA, the RICO enterprise, show that he did not "participate" in the operation and management of ACLA; thus, all RICO and ORICO claims against Defendant Bray are DISMISSED.

V. Intentional Infliction Of Emotional Distress

A. Defendants' Arguments

Defendants contend, as a matter of law, that Plaintiffs cannot recover for intentional infliction of emotional distress caused by either the dissemination of true information or Defendants' lawful exercise of constitutionally protected speech. Furthermore, Plaintiffs fail to allege specific facts showing that Defendants directed conduct towards Plaintiffs which extended beyond the farthest reaches of socially tolerable behavior.

B. Plaintiffs' Arguments

Plaintiffs argue that they may recover on a claim for intentional infliction of emotional distress regardless of whether Defendants are disseminating true information or exercising their constitutional right to free speech. Moreover, whether Defendants' conduct exceeded the bounds of socially tolerable conduct is an issue of fact for the jury.

C. Analysis

To state a claim for intentional infliction of emotional distress, Plaintiffs must allege the following:

> (1) defendant intended to inflict severe emotional distress on the plaintiff,
>
> (2) the defendant's acts were the cause of the plaintiffs severe emotional distress, and
>
> (3) the defendant's acts constitute an extraordinary transgression of the bounds of socially tolerable conduct.

Madani v. Kendall Ford, Inc., 312 Or. 198, 203, 818 P.2d 930 (1991) (citation omitted) (court dismissed plaintiff's claim for intentional infliction of emotional distress where employer fired plaintiff for refusing to pull down his pants at employer's request). The "intent" element of the tort is satisfied where "'the actor desires to inflict severe emotional distress, and also where he knows that such distress is certain, or substantially certain, to result from his conduct.'" *McGanty v. Staudenraus*, 321 Or. 532, 550, 901 P.2d 841 (1995) (reversed the trial court's dismissal of plaintiff's claim for intentional infliction of emotional distress based on defendant's course of conduct constituting sexual harassment, such as unwelcome sexual advances,

comments, and physical conduct directed towards plaintiff) (quoting comment i of the Restatement (Second) of Torts § 46 (1965)).

In considering whether the defendant's acts were an extraordinary transgression of the bounds of socially tolerable behavior, the key focus is "on the purpose and the means used to achieve it." *Patton v. J.C. Penney Co.*, 301 Or. 117, 123, 719 P.2d 854 (1986) (court dismissed employee's complaint alleging that employer intentionally inflicted emotional distress by discharging the employee because he was socializing with a co-worker). The conduct must be deliberate and the means of inflicting the harm must be extraordinary:

> "[t]he additional requirement that defendant's means of inflicting the injury must have been extraordinary is explained as necessary, first, to distinguish actionable conduct from insults, ill temper, and offensive jokes that persons are expected to endure under contemporary standards of behavior, and second, to provide a setting of objective reality for a claim of harm that otherwise rests only on evidence of the plaintiff's subjective reaction divorced from physiological or other tangible injury."

Id. at 123, 719 P.2d 854 (quoting *Brewer v. Erwin*, 287 Or. 435, 457, 600 P.2d 398 (1979)) (submitted issue of outrageousness to the jury where defendant attempted to frighten or bully plaintiff out of her apartment by particularly obnoxious means: disconnecting utilities, using physical violence and threats of violence, and demolishing the building under her feet). "The tort does not provide recovery for the kind of temporary annoyance or injured feelings that result from friction and rudeness among

people in day-to-day life." *Shay v. Paulson,* 131 Or.App. 270, 884 P.2d 870 (1994) (court dismissed complaint alleging that defendant intentionally inflicted emotional distress by forging plaintiff's name on magazine order forms).

Moreover, the court will only consider acts which have occurred within two years from the date the complaint was filed.[33] *Richer v. Poisson,* 137 Or.App. 157, 160-61, 903 P.2d 932 (1995) (concluding that plaintiffs stated a claim for intentional infliction of emotional distress by alleging that, defendant, for the purpose of causing plaintiffs' emotional distress, painted graffiti on their windows, harassed them by telephone and harassed their customers by making obscene gestures) (citing ORS 12.110(1)).

In the present action, Plaintiffs allege that Defendants published and disseminated posters, which threatened physical harm to Plaintiffs, with specific intent to inflict severe mental and emotional distress upon plaintiffs. Compl. ¶ 119. Furthermore, the dissemination of these threatening posters exceeds the bounds of socially tolerable conduct and has caused Plaintiffs to suffer severe mental and emotional distress. Com pl. ¶¶ 120-21. The Complaint also contains significant background regarding the potential violent effect of Defendants' posters, such as murder, attempted murder, and assault of the individuals

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[33] As stated above, the Court interpreted the Complaint as attacking only the Deadly Dozen List and the Crist poster, with all other expressions providing factual context. Both the Deadly Dozen List and the Crist poster occurred within 2 years from October 26, 1995, the date this action was filed. Other "wanted"-style posters were disseminated more than two years before the filing of the Complaint but may be relevant to provide context to the potentially actionable threats.

targeted in the posters. Com pl. ¶¶ 50-80. Based upon these allegations, I cannot hold as a matter of law that Defendants' alleged threatening conduct does not exceed the bounds of socially tolerable conduct. Accordingly, Plaintiffs have stated a claim for intentional infliction of emotional distress.[34]

VI. Punitive Damages

As Defendants correctly state, Article I, section 8, of the Oregon Constitution prohibits punitive damages for injuries resulting from an abuse of protected expression. *Huffman,* 317 Or. at 457, 857 P.2d 101 (punitive damages were properly awarded for trespassing which was non-expressive conduct); *Lewis v. Oregon Beauty Supply Co.,* 302 Or. 616, 629, 733 P.2d 430 (1987) (on a claim for intentional infliction of emotional distress, the court allowed punitive damages for the non-communicable

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[34] In so holding, I reject Defendants' suggestion that they cannot be held liable for the tortious effects of their expression, absent a specific privilege, merely because they are exercising their constitutional right to speech. If Defendants' assertions were true, a victim of defamation could never sue the perpetrator because the offense necessarily involves the exercise of one's right to speech. *See Huffman and Wright Logging Co. v. Wade,* 317 Or. 445, 453, 857 P.2d 101 (1993) ("The content of speech or writing is an element of the tort of defamation;" thus, only compensatory and not punitive damages may be awarded). Moreover, the truthfulness or falsity of the content of Defendants' expressive conduct is irrelevant with regard to the tort of intentional infliction of emotional distress. Rather, the expressive conduct need only be outrageous in the extreme, regardless of whether the content of the communications is true or false. *Id.* at 455, 857 P.2d 101 ("The content of speech is not an element of the tort[ ] * * * of intentional infliction of emotional distress * * * ." Rather, the tort of intentional infliction of emotional distress focuses on the "forbidden effects but expressly prohibit[s] expression to achieve those effects").

conduct but prohibited punitives for the communicable conduct); *Hall v. May Dept. Stores,* 292 Or. 131, 146-47, 637 P.2d 126 (1981) (court held that plaintiff could not receive punitive damages on claim for intentional infliction of emotional distress where the tortious conduct (*i.e.,* falsely accusing plaintiff of stealing and oppressively interrogating her) consisted only of expression). Conversely, the Oregon Constitution does not bar recovery of punitive damages or criminal liability for unprotected expression. *See, e.g., State v. Moyle,* 299 Or. 691, 699-704, 705 P.2d 740 (1985) (noting the similarity between criminal liability and punitive damages, and holding that criminal harassment statute did not violate Article I, Section 8, because it prohibited threats to cause serious injury to that person); *see also Stone,* 84 Or.App. at 578, 735 P.2d 7 ("a demand coupled with a threat of unlawful injury to specific persons or property enjoys no constitutional protection if it is objectively believable that the threat will be carried out if the demand is not complied with").[35]

Oregon law is not entirely clear as to whether Plaintiffs may receive punitive damages for injuries caused by Defendants' alleged conduct in this case. However, if the facts demonstrate that Defendants' expression does not constitute a threat of serious physical harm toward Plaintiffs, that expression may be protected under Article I, Section 8, of the Oregon Constitution, as well as the First Amendment of the United States Constitution. In that

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[35] Likewise, as extensively discussed above, the First Amendment to the United States Constitution also does not protect "true threats" of serious physical harm. *See* discussion in Part II.C. of this Opinion.

event, punitive damages for intentional infliction of emotional distress caused by Defendants' expression would be barred.[36] However, because Plaintiffs allege that Defendants' expression constitutes threats of serious physical harm towards Plaintiffs, Plaintiffs may allege punitive damages for all claims.[37] I decline to reach a decision on this matter at this juncture.

CONCLUSION

For the reasons discussed above, Defendants' Motion to Dismiss Plaintiffs' Complaint (# 103, # 104, # 112) are DENIED. Defendant ACLA's Motion for Judgment on the Pleadings (# 114) is DENIED IN PART and GRANTED IN PART as follows: All RICO and ORICO claims against Defendant Bray are DISMISSED.[38]

Plaintiffs are given LEAVE TO AMEND their Complaint to clearly distinguish between the allegedly actionable and the contextual expressions, as well as to

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[36] As to the other causes of action, if the facts show that Defendants' expressions are not "true threats," most of Plaintiffs' federal and state claims would likely extinguish and this issue would become moot.

[37] Plaintiffs may seek punitive damages on all other claims, so long as the damages are awarded for violation of the statute, and not for the content of the speech.

[38] The inclusion of factual matters outside the pleadings ordinarily requires Rule 12 motions to be treated as a Rule 56 motion for summary judgment, *see* Fed.R.Civ.P. 12(b); *see also* William W. Schwarzer, A. Wallace Tashima, James M. Wagstaffe, Federal Civil Procedure Before Trial, § 9:198 (1996), but at least some discovery must be completed before a motion for summary judgment should even be considered in this case. *See* Fed.R.Civ.P. 56(f).

specifically name the individual Defendants who intended to further the alleged threats of violence.

IT IS SO ORDERED.[39]

[39] I emphasize that this decision is made in a FRCP 12(b)(6) setting where all allegations in the Complaint must be accepted as true. The Court will be reevaluating Plaintiffs' claims with great scrutiny after further discovery has been undertaken and the case is ripe for summary judgment.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PLANNED PARENTHOOD OF THE COLUMBIA/ WILLAMETTE INC.; PORTLAND FEMINIST WOMEN'S HEALTH CENTER; ROBERT CRIST, M.D.; WARREN M. HERN, M.D.; ELIZABETH NEWHALL, M.D.; JAMES NEWHALL, M.D.,

Plaintiffs-Appellees,

v.

AMERICAN COALITION OF LIFE ACTIVISTS; ADVOCATES FOR LIFE MINISTRIES; MICHAEL DODDS; TIMOTHY PAUL DRESTE; JOSEPH L. FOREMAN; BRUCE EVAN MURCH; DONALD TRESHMAN; CHARLES WYSONG; MICHAEL BRAY; ANDREW BURNETT; DAVID CRANE; CHARLES ROY MCMILLAN; CATHERINE RAMEY; DAWN MARIE-STOVER,

Defendants-Appellants.

No. 04-35214

D.C. No. CV-95-01671-REJ

ORDER

(Filed Oct. 26, 2005)

Before: FERNANDEZ, RYMER, and KLEINFELD, Circuit Judges

The panel voted to deny the petition for rehearing. Judges Rymer and Kleinfeld voted to deny the petition for rehearing en banc, and Judge Fernandez so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. 35.

The petition for rehearing and petition for rehearing en banc are DENIED.

18 U.S.C. § 248. Freedom of access to clinic entrances

(a) Prohibited activities. – Whoever –

(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;

(2) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or

(3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship,

shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c), except that a parent or legal guardian of a minor shall not be subject to any penalties or civil remedies under this section for such activities insofar as they are directed exclusively at that minor.

(b) Penalties. – Whoever violates this section shall –

(1) in the case of a first offense, be fined in accordance with this title, or imprisoned not more than one year, or both; and

(2) in the case of a second or subsequent offense after a prior conviction under this section, be fined in

accordance with this title, or imprisoned not more than 3 years, or both;

except that for an offense involving exclusively a nonviolent physical obstruction, the fine shall be not more than $10,000 and the length of imprisonment shall be not more than six months, or both, for the first offense; and the fine shall, notwithstanding section 3571, be not more than $25,000 and the length of imprisonment shall be not more than 18 months, or both, for a subsequent offense; and except that if bodily injury results, the length of imprisonment shall be not more than 10 years, and if death results, it shall be for any term of years or for life.

(c) Civil remedies. –

(1) Right of action. –

(A) In general. – Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that such an action may be brought under subsection (a)(1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services, and such an action may be brought under subsection (a)(2) only by a person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship or by the entity that owns or operates such place of religious worship.

(B) Relief. – In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief and compensatory and punitive

damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses. With respect to compensatory damages, the plaintiff may elect, at any time prior to the rendering of final judgment, to recover, in lieu of actual damages, an award of statutory damages in the amount of $5,000 per violation.

(2) Action by Attorney General of the United States. –

(A) In general. – If the Attorney General of the United States has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, the Attorney General may commence a civil action in any appropriate United States District Court.

(B) Relief. – In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, and compensatory damages to persons aggrieved as described in paragraph (1)(B). The court, to vindicate the public interest, may also assess a civil penalty against each respondent –

(i) in an amount not exceeding $10,000 for a nonviolent physical obstruction and $15,000 for other first violations; and

(ii) in an amount not exceeding $15,000 for a nonviolent physical obstruction and $25,000 for any other subsequent violation.

(3) Actions by State Attorneys General. –

(A) In general. – If the Attorney General of a State has reasonable cause to believe that any person or group of persons is being, has been, or

may be injured by conduct constituting a violation of this section, such Attorney General may commence a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any appropriate United States District Court.

(B) Relief. – In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, compensatory damages, and civil penalties as described in paragraph (2)(B).

(d) Rules of construction. – Nothing in this section shall be construed –

(1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution;

(2) to create new remedies for interference with activities protected by the free speech or free exercise clauses of the First Amendment to the Constitution, occurring outside a facility, regardless of the point of view expressed, or to limit any existing legal remedies for such interference;

(3) to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this section, or to preempt State or local laws that may provide such penalties or remedies; or

(4) to interfere with the enforcement of State or local laws regulating the performance of abortions or other reproductive health services.

(e) Definitions. – As used in this section:

(1) Facility. – The term "facility" includes a hospital, clinic, physician's office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located.

(2) Interfere with. – The term "interfere with" means to restrict a person's freedom of movement.

(3) Intimidate. – The term "intimidate" means to place a person in reasonable apprehension of bodily harm to him- or herself or to another.

(4) Physical obstruction. – The term "physical obstruction" means rendering impassable ingress to or egress from a facility that provides reproductive health services or to or from a place of religious worship, or rendering passage to or from such a facility or place of religious worship unreasonably difficult or hazardous.

(5) Reproductive health services. – The term "reproductive health services" means reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy.

(6) State. – The term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

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18 U.S.C. § 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section –

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

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18 U.S.C. § 1961. Definitions.

As used in this chapter –

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale

of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1591 (relating to peonage, slavery, and trafficking in persons), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound

recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), sections 175-178 (relating to biological weapons), sections 229-229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States,

any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been

involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

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18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of

securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Civil No. 95-1671-JO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL.,
Plaintiffs,

v.

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL.,
Defendants.

SELECTED COURT'S FINAL JURY INSTRUCTIONS

As of 26 Jan. 99

Definition of Threat

A statement is a "true threat" when a reasonable person making the statement would foresee that the statement would be interpreted by those to whom it is communicated as a serious expression of an intent to bodily harm or assault. This is an objective standard – that of a reasonable person Defendants' subjective intent or motive is not the standard that you must apply in this case. In other words, even if you believe that the defendants did not intend the statements to be threatening, you must still find those statements to be threats if you conclude that a reasonable person would have foreseen that those statements, in their entire factual context, would have been interpreted as statements of an intent to bodily harm or assault.

Whether one or more of the defendants made statements that are threats is a matter for you, the jury, to decide. In making this determination, you should consider the total context and circumstances under which the statements were made. The word "context" means all of

the facts and information that would have been known to the person making the statement, including the events surrounding each publication of the statement and the reaction of the listeners to it. The context in this case may include the other posters you heard about, other statements and actions by the defendants and others, the history of anti-abortion violence, and the reaction of the listeners. Plaintiffs, of course, have the burden of proving which of these alleged contextual facts and circumstances were within the knowledge of the defendants. The context also includes evidence of the defendants' motives or intent in creating, preparing or disseminating the statements at issue. In evaluating context, you should also consider evidence presented by the defense of non-violence and permissive exercise of free speech.

I remind you, however, that plaintiffs' claims are based only on the three statements I have listed for you. The evidence concerning other posters, other statements and actions, history of violence, including the violent actions of others you have heard evidence about, and defendants' subjective motives are admissible to show the context or circumstances in which the defendants allegedly made the statements, and which you must consider in determining whether a reasonable person should have foreseen that any of the three statements at issue would be interpreted as threats.

Even a statement that is ambiguous, subtle or conditional can amount to a threat in light of the factual context in which the statement was made. Further, you need not find that the defendants intended to carry out the threat or were even capable of carrying out the threat in order to find that a statement was, in fact, a threat. Nor must you find that any of the defendants actually intended to

threaten plaintiffs, so long as you find that a reasonable person would have foreseen that it would be understood to be threatening.

If you find that any of the defendants' alleged statements, in context, were "true threats," then you must next determine whether they were made in violation of FACE or RICO. If you find that plaintiffs have failed to prove any true threats, your verdict must be for the defendants and you will not proceed to evaluate the alleged FACE or RICO violations.

You have heard evidence during this trial about what the defendants were thinking or what they believed about what they were doing in creating, disseminating, or publishing the three statements alleged to be true threats. I want to make sure that you fully understand the relevance of this evidence to your deliberations on the issues in this case.

In deciding whether the statements are true threats, you may consider the evidence of what the defendants were thinking or what their motives were as part of the context you may consider in deciding what a reasonable person would foresee. This does not change the test of "true threat," as I have just instructed you: You must decide only whether a reasonable person, in the context in which the statement was made, would foresee that the person to whom the statement was communicated would interpret it to be a serious expression of an intent to inflict bodily harm or assault. In other words, the test is not the subjective view of the defendants, but the objective view of a reasonable person.

You will also consider evidence of defendants' intent in deciding other issues in the case. As I will explain in a few

minutes, plaintiffs must prove defendants' intent as part of the "racketeering act" element of their RICO claims. And as I have told you several times during trial and will further instruct you, defendants' intent or malice, or lack thereof, is an element of plaintiffs' proof in their claims for punitive damages.

Claim I FACE Violation

Plaintiffs' first claim is that the defendants violated the Freedom of Access to Clinic Entrances Act, or FACE, by communicating threats of force. As pertinent to this case, FACE prohibits any person from using threats of force to intimidate or interfere with, or attempt to intimidate or interfere with any person's ability to provide reproduction health services, like abortions.

To show that a defendant has violated FACE, plaintiffs must prove the following three elements by a preponderance of the evidence:

> (1) that the defendant made a threat of force, which threat you must have found to have been a "true threat" as I have defined it.
>
> (2) that the plaintiff is or was involved in providing services in a facility that provides reproductive health services;
>
> (3) that the defendant made the threat of force to intimidate or interfere with, or attempt to intimidate or interfere with, the plaintiff's or any other person's ability to obtain or provide reproductive health services.

As used in this instruction, "interfere with" means to restrict a person's freedom of movement, and "intimidate"

means to place a person in reasonable apprehension of bodily harm either to that person or to another. "Reproductive health services" means reproductive health services provided in a hospital, clinic physician's office, or other facility, and includes medical, surgical, counseling or referral services relating to the human reproductive system, including services related to pregnancy or the termination of pregnancy.

To find for a particular plaintiff on the FACE claim, you must find that a defendant used a true threat in an attempt to intimidate or interfere with a person's ability to obtain or provide reproductive health services, and that the plaintiff was aggrieved or harmed by that threat.

Conspiracy to Violate FACE

Plaintiffs also allege that the defendants conspired to violate FACE. In order for you to find that a defendant conspired to violate FACE, you must find by a preponderance of the evidence that:

First, there was an agreement between two or more of the persons to commit acts that would violate FACE (as defined and described a moment ago);

Second, a defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it; and

Third, one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy – and all jurors must agree on a particular overt act that you find was committed.

A conspiracy is a kind of partnership–an agreement of two or more persons to violate the law. The conspiracy violation is the agreement to do something unlawful; it does not matter whether the underlying unlawful act that the conspirators agreed to commit was committed. In other words, a person may be found liable for conspiring to violate FACE even if the conspiracy was not successful and no unlawful acts were actually committed.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You, must find that there was a plan to commit at least one of the violations alleged by the plaintiffs as an object of the conspiracy with all of you agreeing as to the particular violation which the conspirators agreed to commit.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who willfully joins an existing conspiracy is as responsible for it as the originators. On the other hand, one who has no knowledge of the conspiracy but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a conspirator merely by associating with one or more persons who are conspirators, nor merely by knowing that a conspiracy exists.

The third requirement of a finding of conspiracy is that one member performed one overt act for the purpose of carrying out the conspiracy, and you must all agree as to what that overt act was. The overt act does not itself have to be unlawful. A lawful act may be an element of a conspiracy if it was done for the purpose of carrying out the conspiracy. The plaintiffs are not required to prove that the defendants personally did one of the overt acts, only that a member of the alleged conspiracy did it.

If you find that a defendant was a member of a conspiracy, that defendant is responsible for what other conspirators said or did to carry out the conspiracy, whether or not that defendant knew what they said or did. This is so even if the acts were done and the statements were made in the defendant's absence and without the defendant's knowledge. On the other hand, if the acts were done or the statements were made by someone whom you did not find was a member of the conspiracy, or they were not done or said in furtherance of the conspiracy, they may be considered by you only as evidence against the person who said or did them, or as the context or background relevant to this case.

If you find that there was no conspiracy among the defendants to violate FACE, then you must return a verdict in favor of defendants on plaintiffs' FACE conspiracy claim.

Claim II – RICO Violation
Elements of the Hobbs Act: Property

To prove extortion, a plaintiff must prove that a defendant threatened force, violence, or fear to obtain a plaintiff's property. "Property" within the meaning of the

Hobbs Act need not be a tangible belonging, but includes a plaintiff's protected right to provide abortion services free from wrongful threats, violence, coercion or fear. "Property" may also include money plaintiffs contend they were required to spend on security measures as a result of defendants' alleged threats.

It does not matter whether or not the deprivation of property provided an economic benefit to the defendant for you to find that a defendant committed an act of extortion.

Claim II – RICO Violation
Elements of the Hobbs Act: Intent

For plaintiffs to prove the intent element of a Hobbs Act violation, you must find that a defendant made a true threat, as I have defined it, with the intent of depriving a plaintiff of his or her property or protected right to provide abortion services.

Claim II – RICO Violation
Hobbs Act: Attempted Extortion

You may also find a Hobbs Act violation if you find that a defendant attempted to commit extortion even if he or she was not successful in actually committing extortion. If a defendant attempted to commit an act of extortion, it is a violation of the Hobbs Act and a racketeering act under RICO even if the defendant did not actually deprive a plaintiff of property or protected rights. Therefore, if you find that a defendant used threats for the purpose of depriving a plaintiff of property or protected rights, the defendant may be found to have committed attempted extortion, even if the plaintiff continued to provide abortion services despite the defendant's threats.

For you to find that a defendant committed attempted extortion, you must find that the defendant took a "substantial step" toward committing extortion. Mere preparation is not a substantial step. But if you find that a defendant, seeking to deprive a plaintiff of property of the protected right to provide abortion services, issued true threats, that would constitute a substantial step.

Claim II – RICO Violation
Elements of the Hobbs Act: Effect on
Interstate Commerce

If you find that a defendant deprived a plaintiff of his or her property or protected rights or attempted or conspired to do so by the use of threats of force, violence, or fear, you must then decide if the defendant's actions affected interstate commerce or had a probable or potential impact on interstate commerce in any way or to any degree. The defendant need not have intended or anticipated an effect on interstate commerce. You may find this element of an extortion violation met if you find that the effect on interstate commerce is a natural consequence of defendant's actions.

It also is not necessary that the object of the extortion or attempted extortion constitutes commerce, but only that commerce be affected in some way. It is sufficient, for example, if the acts of extortion were aimed at medical facilities or doctors that purchased supplies made in another state or served patients who traveled from another state.

Claim II – RICO Violation
Alleged Racketeering Acts (Extortion)

Plaintiffs allege that the defendants committed racketeering acts of extortion in violation of the Hobbs Act through the use of threats of force, violence, or fear. More specifically, plaintiffs claim that the defendants committed racketeering acts by creating, disseminating, and publishing the Deadly Dozen Poster, the Poster of Dr. Crist, and the Nuremberg Files, in violation of the Hobbs Act.

For you to find that a defendant committed extortion, in violation of the Hobbs Act, plaintiffs must prove by a preponderance of the evidence that:

> (1) a defendant, by the use of a threat of force, violence, or fear involving the Deadly Dozen Poster, Poster of Dr. Crist, or Nuremberg Files, which you must have found to have been a "true threat" as I have defined it, deprived, attempted to deprive, or conspired to deprive a plaintiff of his or her property;
>
> (2) that the defendant acted with intent to deprive the plaintiff of his or her property; and
>
> (3) the defendant's actions could have affected or did affect commerce from one state to another in some way.

Each violation of the Hobbs Act by extortion, attempted extortion, or conspiracy to commit extortion, constitutes a racketeering act under RICO.

I will now instruct you further as to these elements.

Claim IV – Conspiracy to Violate RICO

I will now explain to you the law of conspiracy that is relevant to plaintiffs' RICO conspiracy claim. Whether or not you find any defendant liable under RICO, you must still consider whether that defendant agreed or conspired with any other person or organization to violate RICO. Thus, if you find a defendant liable for violating RICO, you must also separately consider whether that defendant is liable for conspiring with others to commit acts that violate RICO. Likewise, if you find a defendant not liable for violating RICO, you must still separately consider whether that defendant is liable for conspiracy to violate RICO.

For you to find that a defendant conspired to violate RICO, plaintiffs must prove by a preponderance of the evidence that:

(1) there was an agreement between two or more persons to commit acts that would violate RICO;

(2) a defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it; and

(3) one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy – and all jurors must agree on a particular overt act that you find was committed.

With respect to the "overt act" element of a conspiracy, the overt act does not itself have to be unlawful. A lawful act may be sufficient as an element of a conspiracy if it was done for the purpose of carrying out the conspiracy. Additionally, the plaintiffs need not prove that a defendant

personally did the overt act. But, as stated, you must all agree on the particular overt act.

As I told you earlier, a conspiracy is a kind of partnership – an agreement of two or more persons to violate the law. The conspiracy violation is the agreement to do something unlawful; it does not matter whether the conspirators actually commit the underlying violation. Therefore, you may find a defendant liable for conspiring to violate RICO even if you find that the conspiracy was not successful and no racketeering acts were actually committed. In other words, if you find that a defendant conspired to commit the racketeering acts alleged in this case, you may find him or her liable for conspiracy even though no racketeering acts actually were committed by that defendant or, for that matter, by any other defendant.

To find a conspiracy, you need not find that the alleged conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You must find that there was a plan to commit at least one of the racketeering acts alleged by the plaintiffs as an object of the conspiracy.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who willfully joins an existing conspiracy is as responsible for it as the originators. It is no defense to a finding of liability for conspiracy that a defendant joins a conspiracy after it is formed.

If you find the existence of a conspiracy to violate RICO, and you find that a defendant was a member of that conspiracy, then that defendant is responsible for what the other conspirators said or did to carry out the conspiracy, whether or not that defendant knew what the other conspirators said or did. If, however, you find that there was no conspiracy among the defendants to violate RICO, then you must return a verdict in favor of defendants on plaintiffs' RICO conspiracy claim.

Civil No. 95-1671-JO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PLANNED PARENTHOOD OF THE COLUMBIA/
WILLAMETTE, INC., ET AL.,
Plaintiffs,

v.

AMERICAN COALITION OF LIFE
ACTIVISTS, ET AL.,
Defendants.

VERDICT

1. Is the "Deadly Dozen" poster a true threat by one or more of the defendants to bodily harm, assault, or kill any of the plaintiffs?

X	
YES	NO

2. Is the Crist poster a true threat by one or more of the defendants to bodily harm, assault, or kill any of the plaintiffs?

X	
YES	NO

3. Are the Nuremberg files a true threat by one or more of the defendants to bodily harm, assault or kill any of the plaintiffs?

X	
YES	NO

If you answered "yes" to any of the above, please proceed to the next section. Otherwise, please put the presiding juror's number on the signature line, date this form, and

notify the courtroom deputy that you have reached a verdict.

AMERICAN COALITION OF LIFE ACTIVISTS ("ACLA")

1. Did the American Coalition of Life Activists ("ACLA") violate or conspire to violate FACE?

X	
YES	NO

2. If you answered "yes" to Question #1, what damages do you award for ACLA's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$ 2.25 million
Dr. Warren Hern	$ 14,429.00	$ 1.5 million
Dr. Elizabeth Newhall	$ 15,797.98	$ 2 million
Dr. James Newhall	$ 375.00	$ 2 million
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$ 6 million
Portland Feminist Women's Health Center	$ 50,243.30	$ 3 million

---

ADVOCATES FOR LIFE MINISTRIES ("ALM")

1. Did Advocates for Life Ministries ("ALM") violate or conspire to violate FACE?

X	
YES	NO

2. If you answered "yes" to Question #1, what damages do you award for ALM's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$ 2.25 million
Dr. Warren Hern	$ 14,429.00	$ 1.5 million
Dr. Elizabeth Newhall	$ 15,797.98	$ 2 million
Dr. James Newhall	$ 375.00	$ 2 million
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$ 6 million
Portland Feminist Women's Health Center	$ 50,243.30	$ 3 million

3. Did ALM violate or conspire to violate RICO?

X	
YES	NO

4. If you answered "yes" to Question #3, what damages do you award for ALM's violation(s) of RICO?

Dr. Robert Crist	$ 39,656.00
Dr. Warren Hern	$ 14,429.00
Dr. Elizabeth Newhall	$ 15,797.98
Dr. James Newhall	$ 375.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86
Portland Feminist Women's Health Center	$ 50,243.30

MICHAEL BRAY

1. Did Michael Bray violate or conspire to violate FACE?

X	
YES	NO

2. If you answered "yes" to Question #1, what damages do you award for Michael Bray's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$ 1 million
Dr. Warren Hern	$ 14,429.00	$ 1 million
Dr. Elizabeth Newhall	$ 15,797.98	$ 1 million
Dr. James Newhall	$ 375.00	$ 1 million
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$ 2 million
Portland Feminist Women's Health Center	$ 50,243.30	$ 2 million

3. Did Michael Bray violate or conspire to violate RICO?

_____	X
YES	NO

4. If you answered "yes" to Question #3, what damages do you award for Michael Bray's violation(s) of RICO?

Dr. Robert Crist	$ _____
Dr. Warren Hern	$ _____
Dr. Elizabeth Newhall	$ _____
Dr. James Newhall	$ _____
Planned Parenthood of the Columbia/Willamette, Inc.	$ _____
Portland Feminist Women's Health Center	$ _____

_____

ANDREW BURNETT

1. Did Andrew Burnett violate or conspire to violate FACE?

X	_____
YES	NO

2. If you answered "yes" to Question #1, what damages do you award for Andrew Burnett's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$ 1 million
Dr. Warren Hern	$ 14,429.00	$ 1 million
Dr. Elizabeth Newhall	$ 15,797.98	$ 1 million
Dr. James Newhall	$ 375.00	$ 1 million
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$ 2 million
Portland Feminist Women's Health Center	$ 50,243.30	$ 2 million

3. Did Andrew Burnett violate or conspire to violate RICO?

X	
YES	NO

4. If you answered "yes" to Question #3, what damages do you award for Andrew Burnett's violation(s) of RICO?

Dr. Robert Crist	$ 39,656.00
Dr. Warren Hern	$ 14,429.00
Dr. Elizabeth Newhall	$ 15,797.98
Dr. James Newhall	$ 375.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86
Portland Feminist Women's Health Center	$ 50,243.30

DAVID CRANE

1. Did David Crane violate or conspire to violate FACE?

X	
YES	NO

2. If you answered "yes" to Question #1, what damages do you award for David Crane's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$ 1 million
Dr. Warren Hern	$ 14,429.00	$ 1 million
Dr. Elizabeth Newhall	$ 15,797.98	$ 1 million
Dr. James Newhall	$ 375.00	$ 1 million
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$ 2 million
Portland Feminist Women's Health Center	$ 50,243.30	$ 2 million

3. Did David Crane violate or conspire to violate RICO?

X
YES _____ NO

4. If you answered "yes" to Question #3, what damages do you award for David Crane's violation(s) of RICO?

Dr. Robert Crist	$ 39,656.00
Dr. Warren Hern	$ 14,429.00
Dr. Elizabeth Newhall	$ 15,797.98
Dr. James Newhall	$ 375.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86
Portland Feminist Women's Health Center	$ 50,243.30

_____

MICHAEL DODDS

1. Did Michael Dodds violate or conspire to violate FACE?

X
YES _____ NO

2. If you answered "yes" to Question #1, what damages do you award for Michael Dodds' violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$ 750,000.00
Dr. Warren Hern	$ 14,429.00	$ 750,000.00
Dr. Elizabeth Newhall	$ 15,797.98	$ 750,000.00
Dr. James Newhall	$ 375.00	$ 750,000.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$ 1 million
Portland Feminist Women's Health Center	$ 50,243.30	$ 1 million

3. Did Michael Dodds violate or conspire to violate RICO?

X	
YES	NO

4. If you answered "yes" to Question #3, what damages do you award for Michael Dodds' violation(s) of RICO?

Dr. Robert Crist	$ 29,742.00
Dr. Warren Hern	$ 10,822.00
Dr. Elizabeth Newhall	$ 11,848.00
Dr. James Newhall	$ 281.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 304,376.00
Portland Feminist Women's Health Center	$ 37,682.00

TIMOTHY DRESTE

1. Did Timothy Dreste violate or conspire to violate FACE?

X	
YES	NO

2. If you answered "yes" to Question #1, what damages do you award for Timothy Dreste's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$ 750,000.00
Dr. Warren Hern	$ 14,429.00	$ 750,000.00
Dr. Elizabeth Newhall	$ 15,797.98	$ 750,000.00
Dr. James Newhall	$ 375.00	$ 750,000.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$ 1 million
Portland Feminist Women's Health Center	$ 50,243.30	$ 1 million

3. Did Timothy Dreste violate or conspire to violate RICO?

X	
YES	NO

4. If you answered "yes" to Question #3, what damages do you award for Timothy Dreste's violation(s) of RICO?

Dr. Robert Crist	$ 19,828.00
Dr. Warren Hern	$ 7,215.00
Dr. Elizabeth Newhall	$ 7,899.00
Dr. James Newhall	$ 188.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 202,917.00

JOSEPH FOREMAN

1. Did Joesph Foreman violate or conspire to violate FACE?

X	
YES	NO

2. If you answered "yes" to Question #1, what damages do you award for Joseph Foreman's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$ 750,000.00
Dr. Warren Hern	$ 14,429.00	$ 750,000.00
Dr. Elizabeth Newhall	$ 15,797.98	$ 750,000.00
Dr. James Newhall	$ 375.00	$ 750,000.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$ 1 million
Portland Feminist Women's Health Center	$ 50,243.30	$ 1 million

3. Did Joseph Foreman violate or conspire to violate RICO?

YES	NO
X	

4. If you answered "yes" to Question #3, what damages do you award for Joseph Foreman's violation(s) of RICO?

Dr. Robert Crist	$ 9,914.00
Dr. Warren Hern	$ 3,607.00
Dr. Elizabeth Newhall	$ 3,950.00
Dr. James Newhall	$ 94.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 101,459.00
Portland Feminist Women's Health Center	$ 12,561.00

C. ROY MCMILLAN

1. Did C. Roy McMillian violate or conspire to violate FACE?

X	
YES	NO

2. If you answered "yes" to Question #1, what damages do you award for C. Roy McMillan's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$ 1 million
Dr. Warren Hern	$ 14,429.00	$ 1 million
Dr. Elizabeth Newhall	$ 15,797.98	$ 1 million
Dr. James Newhall	$ 375.00	$ 1 million
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$ 2 million
Portland Feminist Women's Health Center	$ 50,243.30	$ 2 million

3. Did C. Roy McMillan violate or conspire to violate RICO?

X	
YES	NO

4. If you answered "yes" to Question #3, what damages do you award for C. Roy McMillan's violation(s) of RICO?

Dr. Robert Crist	$ 29,742.00
Dr. Warren Hern	$ 10,822.00
Dr. Elizabeth Newhall	$ 11,848.00
Dr. James Newhall	$ 281.00

BRUCE MURCH

1. Did Bruce Murch violate or conspire to violate FACE?

X	
YES	NO

2. If you answered "yes" to Question #1, what damages do you award for Bruce Murch's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$ 750,000.00
Dr. Warren Hern	$ 14,429.00	$ 750,000.00
Dr. Elizabeth Newhall	$ 15,797.98	$ 750,000.00
Dr. James Newhall	$ 375.00	$ 750,000.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$ 1 million
Portland Feminist Women's Health Center	$ 50,243.30	$ 1 million

3. Did Bruce Murch violate or conspire to violate RICO?

X	
YES	NO

4. If you answered "yes" to Question #3, what damages do you award for Bruce Murch's violation(s) of RICO?

Dr. Robert Crist	$ 19,828.00
Dr. Warren Hern	$ 7,215.00
Dr. Elizabeth Newhall	$ 7,899.00
Dr. James Newhall	$ 188.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 202,917.00
Portland Feminist Women's Health Center	$ 25,121.00

CATHERINE RAMEY

1. Did Catherine Ramey violate or conspire to violate FACE?

X	
YES	NO

2. If you answered "yes" to Question #1, what damages do you award for Catherine Ramey's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$ 500,000.00
Dr. Warren Hern	$ 14,429.00	$ 500,000.00
Dr. Elizabeth Newhall	$ 15,797.98	$ 500,000.00
Dr. James Newhall	$ 375.00	$ 500,000.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$ 750,000.00
Portland Feminist Women's Health Center	$ 50,243.30	$ 750,000.00

3. Did Catherine Ramey violate or conspire to violate RICO?

X	
YES	NO

4. If you answered "yes" to Question #3, what damages do you award for Catherine Ramey's violation(s) of RICO?

Dr. Robert Crist	$ 19,828.00
Dr. Warren Hern	$ 7,215.00
Dr. Elizabeth Newhall	$ 7,899.00
Dr. James Newhall	$ 188.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 202,917.00
Portland Feminist Women's Health Center	$ 25,121.00

DAWN STOVER

1. Did Dawn Stover violate or conspire to violate FACE?

X	
YES	NO

2. If you answered "yes" to Question #1, what damages do you award for Dawn Stover's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$ 500,000.00
Dr. Warren Hern	$ 14,429.00	$ 500,000.00
Dr. Elizabeth Newhall	$ 15,797.98	$ 500,000.00
Dr. James Newhall	$ 375.00	$ 500,000.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$ 750,000.00
Portland Feminist Women's Health Center	$ 50,243.30	$ 750,000.00

3. Did Dawn Stover violate or conspire to violate RICO?

X	
YES	NO

4. If you answered "yes" to Question #3, what damages do you award for Dawn Stover's violation(s) of RICO?

Dr. Robert Crist	$ 9,914.00
Dr. Warren Hern	$ 3,607.00
Dr. Elizabeth Newhall	$ 3,950.00
Dr. James Newhall	$ 94.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 101,459.00
Portland Feminist Women's Health Center	$ 12,561.00

DONALD TRESHMAN

1. Did Donald Treshman violate or conspire to violate FACE?

X	
YES	NO

2. If you answered "yes" to Question #1, what damages do you award for Donald Treshman's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$ 1 million
Dr. Warren Hern	$ 14,429.00	$ 1 million
Dr. Elizabeth Newhall	$ 15,797.98	$ 1 million
Dr. James Newhall	$ 375.00	$ 1 million
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$ 2 million
Portland Feminist Women's Health Center	$ 50,243.30	$ 2 million

3. Did Donald Treshman violate or conspire to violate RICO?

	X
YES	NO

4. If you answered "yes" to Question #3, what damages do you award for Donald Treshman's violations(s) of RICO?

Dr. Robert Crist	$ _____
Dr. Warren Hern	$ _____
Dr. Elizabeth Newhall	$ _____
Dr. James Newhall	$ _____
Planned Parenthood of the Columbia/Willamette, Inc.	$ _____

Portland Feminist Women's Health Center	$ _____

CHARLES WYSONG

1. Did Charles Wysong violate or conspire to violate FACE?

X	
YES	NO

2. If you answered "yes" to Question #1, what damages do you award for Charles Wysong's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$ 1 million
Dr. Warren Hern	$ 14,429.00	$ 1 million
Dr. Elizabeth Newhall	$ 15,797.98	$ 1 million
Dr. James Newhall	$ 375.00	$ 1 million
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$ 2 million
Portland Feminist Women's Health Center	$ 50,243.30	$ 2 million

3. Did Charles Wysong violate or conspire to violate RICO?

X	
YES	NO

4. If you answered "yes" to Question #3, what damages do you award for Charles Wysong's violation(s) of RICO?

Dr. Robert Crist	$ 39,656.00
Dr. Warren Hern	$ 14,429.00
Dr. Elizabeth Newhall	$ 15,797.98
Dr. James Newhall	$ 375.00

Planned Parenthood of the Columbia/Willamette, Inc.	$	405,834.86
Portland Feminist Women's Health Center	$	50,243.30

The foregoing is the unanimous verdict of this Jury in the matter of *Planned Parenthood, et. al. v. American Coalition, et. al.*, Civil No. 95-1671-JO.

DATED this 2nd day of February, 1999,

14

PRESIDING JUROR NO.

(3)

No. 05-1083

FILED
APR 7 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL.,

Petitioners,

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ABBREVIATIONS KEY

ACLA	Petitioner American Coalition of Life Activists and will also designate all petitioners collectively herein
AFA Br.	Brief of Amicus Curiae the American Family Association Center for Law and Policy
ALL Br.	Brief of Amicus Curiae American Life League
ALM	Petitioner Advocates for Life Ministries
deP. Br.	Brief of Amicus Curiae Paul deParrie
deP. L.	Lodging of Amicus Curiae Paul deParrie
FACE	The Freedom of Access to Clinics Entrances Act of 1994, 18 U.S.C. § 248
L.	Lodging of petitioners
LLDF Br.	Brief of Amicus Curiae Life Legal Defense Foundation
Pet.	ACLA's petition for writ of certiorari
Pet. App.	Appendix to the petition for certiorari
Resp. Br.	Respondents' opposing brief
Reply Br. App.	Appendix to this reply brief

INTRODUCTION

Twenty-two *amici* have joined in six *amicus* briefs urging this Court to grant certiorari in view of the national importance of this case. Although respondents characterize this case as a "factbound" dispute, Resp. Br. 1, every First Amendment case this Court has decided de novo was "factbound," because "the reaches of the First Amendment are ultimately defined by the *facts* it is held to embrace. . . . " *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group,* 515 U.S. 557, 567-68 (1995) (all emphasis added in this brief). Moreover, the facts are not disputed as to *any* of the three questions presented.[1]

I. RESPONDENTS' CONCESSIONS

A. Respondents *Anticipated* The Filing Of This Second Petition. When it suited them to oppose a stay of the Ninth Circuit's mandate before the first certiorari petition, respondents argued that "the Supreme Court is unlikely to grant certiorari *at this time* . . . because *there is no final judgment in this case*," and that in view of the "*two* anticipated cert petitions," petitioners should not be granted a stay pending the first petition. Respondents then urged this Court to deny certiorari because "there is *no final judgment*. . . . " Reply Br. App. 1-2, 7 n.10.

Respondents now reverse their earlier position and suggest (without authority) that the prior denial of certiorari implied a determination on the merits. Resp. Br. 9,

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[1] Respondents state they "disagree with petitioner's statement of facts," Resp. Br. 3, n.5, but do not dispute any fact in the Statement of the Case. Pet. 2-8. Instead, Resp. Br. 2, they recite such irrelevancies as the constitutionally protected view of some petitioners that use of force to defend life in the womb is morally justified. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

Also, respondents' assertion that the dissenters merely "disagreed with the application" of a correctly stated legal standard, Resp. Br. 7-8, misrepresents the dissent. The five dissenters objected that the en banc majority "utterly *fails to apply* its own definition of a threat," and that its rationale is contrary to this Court's precedents. Pet. App. 129, 152-53.

n.13. That is not the law. *Missouri v. Jenkins,* 515 U.S. 70, 83-86 (1995); *Mercer v. Theriot,* 377 U.S. 152, 153-54 (1964).[2]

Moreover, respondents' own insistence on the lack of a final judgment destroys their argument against application of this Court's intervening decisions. *See* Pet. 17-18; *Fogel v. Chestnutt,* 668 F.2d 100, 109 (2nd Cir. 1981); LLDF Br. 3-13; Rutherford Br. 4-18.

B. Respondents Have Conceded The Key First Amendment Facts. Among other facts set forth in the petition, *see* Pet. 2-8, 13, 20, respondents concede that (1) the posters and non-party website are devoid of threatening language and call only for peaceful activities; (2) petitioners had nothing to do with the "scorecard" portion of the website the Ninth Circuit deemed unprotected;[3] (3) the imaginary "poster pattern," not what ACLA's posters actually said, is the *sole basis* for affirmance; (4) in the entire history of the pro-life movement only *one* maker of posters of abortion doctors – the late Paul Hill – committed violence; (5) hundreds of anti-abortion posters of abortion doctors have circulated for years without violence following;[4] (6) the jury was permitted and exhorted to punish those portions of the posters and website even the Ninth Circuit admits are protected; (7) the jury was permitted and exhorted to punish as a "republication" of the "threats," a magazine article and an editorial; and (8) the district court's injunction punishes the very aspects of

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[2] Respondents suggest that this case is *still* not ripe for review because they might ask for a new trial rather than accept the remitted punitive damages. Resp. Br. 10 n.14. Respondents represented to the Ninth Circuit, however, that "Physicians *do not intend* to ask the district court for a new trial." Reply Br. App. 4.

[3] Unable to deny this, respondents offer the irrelevant observation that ACLA pioneered the concept of "Nuremberg Files" containing "evidence" on particular doctors. Resp. Br. 4.

[4] Pet. App. 131-32; deP. Br. 12-16; deP. L. 10-67.

the communications even the Ninth Circuit deemed protected.[5]

II. THE NINTH CIRCUIT HAS DEPARTED FROM ALL FIRST AMENDMENT PRECEDENT

A. Disregard Of The Protection Owed To Public Forum Political Speech. Respondents assert that the Ninth Circuit "carefully considered the political aspect" of ACLA's posters before upholding their massive punishment by a local jury. Resp. Br. 13. On the contrary, the Ninth Circuit *flatly rejected* such consideration, Pet. App. 102, despite this Court's teaching that "expression on *public issues* 'has always rested on *the highest rung* of . . . First Amendment values'" and that "extreme care" must be used in upholding its punishment. *NAACP v. Claiborne Hardware*, 458 U.S. 886, 913, 926-27 (1982); ALL Br. 3-11.

Respondents fail to distinguish *Claiborne*. As Judge Kozinski correctly explained, the en banc majority contradicted *Claiborne*'s central holding: Public political speech is actionable only when the speaker directly and specifically authorizes or threatens unlawful acts. Pet. App. 135. To conclude that *Claiborne* does not control, one would have to reason that Charles Evers's directly threatening public statements were not "true threats" against boycott violators merely because Evers allowed his *associates* to identify the violators, whereas ACLA's public statements to a national audience *are* "true threats" merely because

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[5] Although conceding the relevant facts, respondents repeat demonstrable misrepresentations from their brief opposing the first certiorari petition. (No. 02-563.) They falsely assert that Paul Hill, who killed Dr. Britton, was "closely-tied to petitioners," Resp. Br. 3, even though the district court instructed the jury (without objection by respondents) that petitioners and Hill "are not in the same organizations and *they are unconnected*." Tr. 768. Respondents also repeat the falsehood that "the Nuremberg Files contained Physicians' [*i.e.*, respondents'] names, addresses, and family information." Resp. Br. 4. The website contains *no* such information, but only business information published by respondent Hern at www.drhern.com. L. 12-19, 27-31.

ACLA identified respondents (and dozens of others) *without threatening anything.* That conclusion is absurd, but the Ninth Circuit embraced it.[6]

B. Use Of A Negligence Standard To Punish Political Speech. While the communications at issue are not "threats" under any standard of *mens rea*, intent to threaten is essential to distinguish political hyperbole and rhetoric from "true threats."

Respondents do not deny that even the Ninth Circuit now recognizes that this Court's intervening decision in *Virginia v. Black*, 538 U.S. 343 (2003), means the lower courts "are therefore bound to conclude that speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker *subjectively intended* the speech as a threat." *United States v. Cassel*, 408 F.3d 622, 633 (2005).

Nor do respondents deny that the jury in this case was instructed precisely to the contrary: "Defendants' subjective intent or motive is *not the standard* that you must apply. . . . " Pet. App. 416. To make sure the jury got the message, the district court further instructed that the jury "must" impose liability "even if you believe that the defendants *did not intend* the statements to be threatening." *Id.*

Respondents utterly fail to address this patently unconstitutional instruction. Instead, they speculate irrelevantly that the jury found "intimidation" under FACE. Resp. Br. 15. But the same jury was instructed that the alleged "threats," which were *the only statutory predicate* for "intimidation," need not be intended, and that the jurors *must not look* for such intent. The jury was thus directed to find "intimidation" without any intent to threaten. Respondents' argument reduces to the nonsensical contention that the jury found precisely what it was instructed *not* to find.

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[6] Respondents point to the Ninth Circuit's assertion that Evers's statements had no "context of violence" surrounding them. Resp. Br. 14. On the contrary, *boycott operatives* committed numerous violent acts against boycott breakers, including shots fired at homes. *Claiborne*, 458 U.S. at 904-06; Pet. App. 136-46. Here, ACLA committed no violence.

The Solicitor General's opinion three years ago that this case is "not a suitable vehicle" for determining the intent issue is mystifying. There could not be a more suitable vehicle than a case in which the jury was instructed that intent to threaten *is not the standard.*[7]

Respondents do not address the conflict between the Ninth Circuit, which post-*Cassel* now requires specific (subjective) intent in light of *Black*, and the Fifth Circuit's requirement of a "reasonable person" (*i.e.*, negligence) standard in spite of *Black*. *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004). Respondents claim that *Cassel* represents only an intra-circuit conflict, which is obviously wrong. Nor do respondents address the conflict between the en banc majority's decision here and the Second Circuit in *United States v. Kelner*, 534 F.2d 1020 (2nd Cir. 1976), which requires for an actionable threat "an unequivocal, unconditional, immediate and specific [statement]" conveying "gravity of purpose and imminent prospect of execution." *Id.* at 1027. The Second Circuit has applied *Kelner* in a FACE case, *Spitzer v. Operation Rescue*, 273 F.3d 184 (2nd Cir. 2001), thus sharpening the conflict. *See* Kraeger Br. 9-13.

C. Petitioners Were Held Liable For "Generating Fear." Recognizing that the First Amendment does not permit punishment of speech on the basis contrived by the Ninth Circuit – "generating fear" of third-party violence by "replicating the poster pattern," Pet. App. 123 – respondents try to deny that the Ninth Circuit held what it held. Resp. Br. 19. Yet respondents fail to address the quoted language from the Ninth Circuit opinion. Pet. 20-21. Instead, they refer to the Solicitor General's

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[7] Respondents falsely assert that ACLA failed to preserve the jury charge issue. A rejected specific intent jury instruction was filed under the prominent bold caption "**PRESERVED FOR APPEAL**" and was pursued thereafter both orally and in writing. *See* Ninth Circuit Joint Excerpts of Record [JER], 513, 633; Tr. 41-42 (1-26-99); JER 625, 627; Tr. 3120. Defense counsel's statement during the charge conference, "I am not arguing, Your Honor, that the test should be changed," was only an acknowledgment that further argument was futile. Tr. 3120.

discussion of the difference between threats and incitement – precisely the distinction the Ninth Circuit has obliterated. Tellingly, respondents refer to ACLA's "threats" only in the abstract, and never actually defend the "poster pattern" theory as such.[5]

Black establishes that a true threat (versus incitement) must convey the *speaker's* "intent to *commit* violence" himself or herself, not merely to "generate fear" of violence by unrelated parties in the unknown future. That is the precise point anticipated by the original three-judge panel in vacating the verdict here, and by the Second Circuit in *Spitzer,* 273 F.3d at 196, a FACE case: "a court must be sure that the recipient is fearful of the execution of the threat *by the speaker*. . . . [It is not sufficient that the statements] increased the recipient's apprehension of harm."

By insisting "this is not an incitement case," Resp. Br. 19, respondents concede away their entire case. For they cannot deny that the *only* basis the Ninth Circuit could contrive for sustaining liability was an attenuated incitement theory: *i.e.*, that petitioners' otherwise protected speech "generated fear" because violence by parties unrelated to ACLA had remotely followed other peoples' past publication of posters with a "similar" "format." Pet. 19-24.

Respondents' own reference to *Black*, Resp. Br. 15, only highlights that the "poster pattern" is a canard. *Black* upheld prohibition of cross burning only because it is "inextricably intertwined" with more than a century of violent acts *by Klan members* after the burning of *Klan* crosses. *Virginia v. Black*, 538 U.S. 343, 352 (2003). The history of posters of abortion doctors, however, is "inextricably intertwined" with *non-violent* activity: Paul Hill is

[5] Although respondents are correct that the jury was instructed on the difference between threats and incitement, Resp. Br. 20, the Ninth Circuit's affirmance depends on an erroneous conflation of the two concepts, without which the court had no rationale to sustain the jury's punishment of clearly protected speech.